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Supreme Court, U.S.
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In the

# Supreme Court of the United States

CITY OF SAINT PAUL,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether private residential real estate acquired by the United States Department of Housing and Urban Development is exempt from enforcement of generally applicable state and local health and safety codes.

## LIST OF PARTIES

The parties to this action are the City of Saint Paul, a political subdivision of the State of Minnesota, and the United States Department of Housing and Urban Development.

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 258 F.3d 750 (8th Cir. 2001). App. at 1-7.[1] The opinion of the United States District Court for the District of Minnesota granting the permanent injunction is found at No. 00-258, slip op. (D. Minn. May 1, 2000). App. at 8-21. The opinion of the United States District Court for the District of Minnesota denying the motion for a stay or modification of the injunctive relief is reported at 193 F.R.D. 640 (D. Minn. 2000). App. at 22-25.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was filed on August 2, 2001, and this petition for writ of certiorari has been filed within ninety days of that date. The Supreme Court has jurisdiction to review the decision of the Eighth Circuit pursuant to 28 U.S.C. § 1254(1) (2001).

## CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

Article I, Section 8 of the Constitution provides in the relevant part: "The Congress shall have Power:

> To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general Welfare of the United States;...

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[1] "App. at #" is the form used herein for citation to specific pages in the Petitioner's Appendix.

> To regulate Commerce with foreign nations, and among the several states, and with the Indian tribes;...
>
> To exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful Buildings; and
>
> To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof."

U.S. CONST., art. I, § 8, cl. 1, 3, 17, 18.

Article IV, Section 3 of the Constitution provides in the relevant part: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state." U.S. CONST., art. IV, § 3, cl. 2.

Article VI, Clause 2 of the Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST., art. VI, cl. 2.

The relevant provisions of the National Housing Act ("NHA") are reproduced in the Appendix at pages 26-58. Property Disposition Regulation, 24 C.F.R. § 291 (1999) and Executive Order 12612, 52 Fed. Reg. 41685 (1987) are reproduced in the Appendix at pages 59-62. The relevant provisions of the Handbook for the Department of Housing and Urban Development are reproduced in the Appendix at page 69. Minnesota Statutes Sections 16B.62, 299F.011, 299F.057 are reproduced in the Appendix at pages 71-78. The City of St. Paul's Nuisance Abatement Code is reproduced in the Appendix at page 79.

## STATEMENT OF THE CASE

In a sweeping intrusion into state authority, the United States Court of Appeals for the Eighth Circuit, in the case below, affirmed an extraordinarily broad injunction issued by the United States District Court for the District of Minnesota in favor of the United States Department of Housing and Urban Development ("HUD") against the City of Saint Paul, Minnesota ("City"). The district court ordered:

> that the Secretary of the U.S. Housing & Urban Development ("HUD") or any agent, officer, or employee of HUD is immune from the application of Defendant City of St. Paul's Nuisance Abatement Ordinance, Chapter 45 of the St. Paul Legislative Code, ("Chapter 45") to HUD-acquired homes located in St. Paul and that federal law preempts and makes invalid Chapter 45 as it has been or may be applied to HUD;
>
> IT IS FURTHER ORDERED that Defendant City of St. Paul is permanently enjoined from 1) ordering the Secretary of HUD or any other agent, officer, or employee of HUD in the future to abate any nuisance conditions that the City has identified in any property

> owned by HUD; 2) demolishing as a nuisance building any structure located on a property owned by the Secretary of HUD; or 3) taking any other action inconsistent with this Order, including any mandatory inspections that would hinder the use or transfer of HUD-owned properties.

App. at 20-21. Thus, the injunction is categorical and absolute, precluding enforcement of even those aspects of the city ordinance that are undisputably consistent with federal policy and vital for public health and safety.

The City's Nuisance Abatement Ordinance, Chapter 45 of the St. Paul Legislative Code ("Chapter 45"), prohibits a building owner from maintaining a nuisance, and authorizes the City to abate the nuisance in the event the owner fails to do so after notice. Legislative Code § 45.04 and § 45.08; App. at 86-88. It is an enforcement mechanism for the City's health and safety codes, which are based upon the State Uniform Building and Fire Codes. See Minn. Stat. §§299F.011, 299.057 (2001) (Fire Code adoption and enforcement). Minn. Stat. §16B.62 (2001) (State Building Code adoption and enforcement); App. at 71-78. Both codes are based on model uniform codes that are generally accepted and in use throughout the United States. In addition to a nuisance at common law, the injunction prohibits the enforcement of Chapter 45 provisions such as 45.03 (1) (building in danger of collapse), 45.03 (3) (fire hazards), 45.03 (8) (health hazards), and 45.03 (23) (rat infestation). App. at 82-86. The effect of the district court's order then, is to preclude the City from acting to protect its citizens from nuisances that seriously threaten public health and safety, simply because HUD is maintaining the particular nuisance.

The City has exercised this power throughout its history. As early as 1854, before Minnesota acquired statehood, the City enacted regulations prohibiting owners or occupants of residential properties from maintaining nuisances. Over the

years, the City codified the applicable standards in a minimum property maintenance code. The City's longstanding policy and purpose is "to protect the public health, safety and welfare in *all* structures and on *all* premises." Legislative Code §45.01; App. at 79. (emphasis added).

The injunction grew out of a conflict between the City and HUD concerning a particular property at 1328 Minnehaha Avenue, St. Paul, Minnesota. HUD acquired it in April of 1999 through the claims process under its Single Family Mortgage Insurance Program. It was vacant and blighted. In July of 1999, the City inspected it finding serious health and safety concerns, including a cracked and sinking foundation, severe animal and bird infestation, and mold and rot. The City sent HUD and First Preston Foreclosure Specialists, a private firm HUD hired to manage the property, an Order to abate the nuisance within 30 days. First Preston Foreclosure Specialists asked for and received from the City a list of *all* code violations at the property, which list was much more extensive than just the nuisance-creating violations. HUD and First Preston Foreclosure Specialists took no action towards abating the nuisance.

After due notice, on October 19, 1999, the City held a hearing on the Order before a legislative hearing officer. Neither HUD nor First Preston Foreclosure Specialists appeared. The legislative hearing officer recommended that the City abate the nuisance. Again after due notice, on October 27, 1999, the City Council held a public hearing on the matter. First Preston Foreclosure Specialists appeared, without HUD, and asked for a continuance to allow it time to sell the property. After hearing all the testimony, the City Council adopted a resolution ordering the owner to repair or remove the building within fifteen days. The City Council offered to give First Preston Foreclosure Specialists an additional six months to correct the violations if it would post

a $2000 performance bond. It posted no bond, however. On November 15, 1999, three days after the repair or remove deadline, First Preston Foreclosure Specialists asked the City Council to reconsider its decision in light of the fact that a potential buyer had been identified, and the City Council refused. The present action followed, commencing on February 3, 2000. After the district court issued the injunction, and refused to stay its effect, HUD sold 1328 Minnehaha to a private party, thus mooting any issues as to that particular property. The injunction, however, applies to all HUD-acquired properties, so the controversy continues.

The City found this permanent injunction intolerable. Its stunning breadth and its perpetual effect ham-strung the City, as far as HUD-acquired property is concerned, no matter how bad the nuisance condition. As a consequence, the City, without success, asked the District Court to modify the injunction, App. at 22-25, and thereafter appealed to the Eighth Circuit.

Given the constitutional gravity of preempting state police power, the analysis of the Eighth Circuit was surprisingly casual. Its legal analysis of the Supremacy Clause issue started by relying upon rules applicable to federal enclaves, (*Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) ("activities of federal installations are shielded from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation")), App. at 4, only later to declare, "There is no claim in the present case that this HUD acquired house was ever a federal enclave." App. at 7. Cases such as *California Costal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) and *Kleppe v. New Mexico*, 426 U.S. 529 (1976) make it clear that the normal preemption tests apply to state regulation of federally owned property. The difference is federal enclaves are acquired under U.S. Constitution Article I, Section 8, and are subject to exclusive federal jurisdiction, while other

federal property, such as HUD's property, is acquired under U.S. Constitution Article IV, Section 3, and is subject to both state and federal jurisdiction. The Eighth Circuit failed to mention these cases, let alone explain why they did not apply. Further, the Court of Appeals failed to make clear whether it was invoking express preemption, field preemption, or conflict preemption. If conflict preemption, again it was not clear whether preemption was based upon the statute directly or on the administrative practices of HUD.

As to the statutes, no federal statute expressly provides for preemption of state and local health and safety codes for properties acquired by HUD under the Single Family Mortgage Insurance Program. There is no inherent conflict between the statutory goal of assuring safe and healthful housing and the use of local housing codes. In fact the contrary is true. Congress provided express preemption in other specific situations involving HUD operations. For example, Congress limited the States' ability to limit the interest rates charged on mortgages insured under the National Housing Act. 12 U.S.C. §1709-1a (2000); App. at 34. Further, Congress explicitly preempted state regulation of due-on-sale clauses for mortgages insured under the National Housing Act. 12 U.S.C. §1701j-3 (2000); App. at 26-30. Congressional silence on preemption in this matter, in the face of express preemption in other parts of the statute, suggests that Congress did not intend to preempt state and local health and safety regulation in this case.

Whether the Eighth Circuit ruled that the statute of its own force preempts local codes or that it authorized HUD to preempt, there is a square conflict with *Burroughs v. Hills*, 741 F.2d 1525 (7th Cir. 1984) (before Judges Nichols, Posner and Flaum), a conflict the Eighth Circuit ignores. Furthermore, the claim that unclear agency statements can preempt local codes conflicts with principles of federalism. The pertinent regulation, 24 C.F.R. § 291.100 contains no

express preemption. App. at 59-61. HUD's Property Disposition Handbook for 1 to 4 Family Properties, REV-2 (1994), Directive No. 4310.5, §6-19, which was not adopted by administrative rule and comment, likewise does not expressly preempt state or local law. App. at 69. The Eighth Circuit acknowledged that the provisions of the handbook dealing with building repair were "written in sometimes contradictory phrases." App. at 6. Thus the effect of the rule the Eighth Circuit adopted is that application of state law to HUD's property may be preempted by unclear agency statements.

The Eighth Circuit relied upon a need for uniformity, but the Handbook reveals that HUD's property management is decentralized, so uniformity is not a critical need. *See* 4310.5, §1-5B(4); App. at 70. (field offices responsibility for management of acquired property); *cf.* 4315.1, §10-1C; App. at 70. (directing compliance with local codes for HUD-owned rental projects). Thus, there seems to be no compelling need to preempt local regulations based on uniformity.

Finally, on appeal, the City again sought relief from the intolerable breadth of the injunction. The Eighth Circuit blithely rejected the request in one sentence. App. at 7.

## REASONS FOR GRANTING THE WRIT

This case is important, meriting the Supreme Court's review. The decision below is in conflict with the established rule of law in the Seventh Circuit, is in conflict with the established practice throughout the nation, and is intolerable. Given the nationwide scope of HUD's operations, it will significantly affect neighborhoods in virtually every city in every state in the nation. Even if there were no conflict between the Seventh and Eighth Circuits, the sweeping intrusion into state authority and the impact on the public warrant Supreme Court review.

## I. THE SUPREME COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS.

The Eighth Circuit's decision below created an intolerable conflict with the established rule of law in the Seventh Circuit and the established practice throughout the nation. In *Burroughs v. Hills*, 741 F.2d 1525 (7th Cir. 1984), the Seventh Circuit ruled that Congress intended, and federal law required, that HUD comply with state and local health and safety codes. By contrast, the Eighth Circuit ruled that HUD is exempt from all state and local health and safety codes. Favoring lower operating costs over minimum health and safety standards, the Eighth Circuit dismissed the contrary *Burroughs* case as little more than an example of why HUD should desire freedom from state and local codes.

### A. In the Seventh Circuit, HUD Must Manage its Property in Compliance with State and Local Law.

Pursuant to the mortgage insurance provisions of the National Housing Act, 12 U.S.C. § 1707, (App. at 32-33) *et seq.*, HUD acquired a three-story residence on the south side of Chicago after a foreclosure. *Burroughs v. Hills*, 564 F.Supp. 1007, 1009, 1014 (N.D. Ill. 1983), *affirmed* 741 F.2d 1525 (7th Cir. 1984). HUD spent $285 on repairs and contracted with a property manager to oversee the building for $17.50 per month. *Id.* The building was uninhabited, boarded up, in a state of disrepair, and during the 19 months that HUD owned it, "substantially deteriorated" due to neglect and vandalism. *Id.* at 1009, 1011. HUD's disposition policy with respect to one- to four-unit buildings at the time it acquired this property was "to maximize sales on a cash only,

as-is, without warranty basis."[2] *Id.* at 1009 (internal quotes omitted).

A community organization and several of its members sued for money damages and injunctive relief, alleging that HUD and its agents had violated the National Housing Act, HUD regulations, Illinois statutes, and Chicago's municipal code. *Id.* at 1010. The damages portion of the suit survived the conveyance of the property as a vehicle to determine whether neighbors of blighted HUD-owned property had a cause of action for damages. *Burroughs*, 564 F.Supp. at 1011. HUD defended the action contending that federal law imposed no duties upon it enforceable by private action, and that it was "not answerable under state and local law." *Id.*

The district court held that HUD had a duty under both federal and state law to maintain the properties it acquired through foreclosure. *Id.* at 1018. As a matter of federal law, the court looked to the statements of federal policy contained in 12 U.S.C. § 1701t (App. at 31), 42 U.S.C. §§ 1441 and 1441a (App. at 56-57, 58), and concluded that Congress intended both to benefit low income persons in need of adequate housing *and* to develop and maintain "stable, desirable urban communities." *Burroughs*, 564 F.Supp. at 1014 (quoting *Alschuler v. Dept. of Housing and Urban Development*, 686 F.2d 472, 478 (7th Cir. 1982)). The court acknowledged that the National Housing Act ("NHA") gave the Secretary of HUD the power to "deal with, *complete*, rent, *renovate*, *modernize*, insure, or sell for cash or credit, in his discretion, any properties conveyed to him." *Id.* at 1015 (quoting 12 U.S.C. § 1710(g)) (App. at 43-44) (emphasis

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[2] In response to Mayor Daley's objection to this policy, HUD developed a "Chicago Plan" that required purchasers of certain buildings to escrow funds which would be released only after a city inspector certified that there were no major local code violations. *Burroughs*, 564 F.Supp. at 1009-10.

added). This statutory provision did not suggest to the court, however, that HUD had plenary discretion to neglect the properties it acquired. On the contrary, the court read Section 1710(g) (App. at 43-44) as confirming the congressional goal to aid "in the preservation of existing housing and urban communities and the resulting benefit to residents of neighborhoods where the federal government invests its funds." *Id.* at 1014.

The district court next turned to the guidelines promulgated in HUD's Handbook, but solely for the purpose of gleaning evidence of legislative intent. *Id.* at 1015, n.7 ("[T]hey are relevant to the extent they support congressional intent as expressed in the language or history of the statute."). The court found that the "guidelines indicate that the NHA was intended at least in part to ensure the preservation of existing housing and the protection of residents of neighborhoods receiving federal housing monies." *Burroughs*, 564 F.Supp. at 1015. The court held that the NHA, as illuminated by the Handbook, imposed upon HUD the duty to maintain the properties it acquires through foreclosure. *Id.*; *see id.*, n.7. The court concluded its analysis as follows:

> First, this circuit has read the NHA as imposing a duty upon HUD to act consistently with national housing policies. One of those policies or goals is the preservation of existing housing and neighborhoods. Second, HUD's own internal guidelines make mandatory HUD's maintenance and repair of buildings it acquires through mortgage foreclosure.

*Id.* (citations omitted).[3]

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[3] The district court went on to hold that a private action for damages

Considering HUD's obligations under state and local law, the district court rejected the contention that HUD was free from state regulation under the Supremacy Clause. *Burroughs*, 564 F.Supp. at 1018. The court expressly held "that *Congress had not granted HUD the right to preempt or disregard reasonable local health regulations concerning properties which it acquires.*" *Id.* (citing *City-Wide Coalition, Etc. v. Philadelphia Hous. Auth.*, 356 F.Supp. 123, 129 (E.D. Pa. 1973) and *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1055 (D.C. Cir. 1971)) (emphasis added). Rejecting the general proposition that the Supremacy Clause completely exempts federal officials from the obligations of state law, the court reasoned:

> Rather, when an agency of the federal government *insinuates itself into the local business world*, as HUD does here under the mortgage insurance and foreclosure provisions of the NHA, it should, as a general rule, be held to the *same legal obligations as a private property owner*. *Cf. F.H.A. v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940) (construing NHA waiver of sovereign immunity provisions and holding that "when Congress *launched a governmental agency into the commercial world* and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be . . ."); *City of Philadelphia v. Page*, 363 F.Supp. 148, 153 (E.D. Pa. 1973)

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was not authorized because it would contravene the fundamental objectives of the statute. *Burroughs*, 564 F.Supp. at 1017. "The primary purpose of the legislative scheme is to upgrade the nation's housing." *Id.* (quoting *Cedar-Riverside Assoc. v. City of Minneapolis*, 606 F.2d 254, 258 (8th Cir. 1979)) (internal quotes omitted).

> (holding HUD liable over to purchaser of HUD property which violated local ordinances: "*When the government goes into the marketplace it must go as everyone else*" (citation omitted)).

*Id.* (emphasis added). The court concluded by noting HUD's own internal guidelines "buttressed" its view that HUD-owned property is subject to local housing codes. *Id.*; *see also id.* at 1015, n.7 (clarifying that court only considered the Handbook as evidence of legislative intent).

Turning finally to the subject of conflict preemption, the district court held that the state and local laws in question did not conflict with the purposes of the NHA. *Burroughs*, 564 F.Supp. at 1018. The court reasoned that municipal codes that prohibit operating a building as a nuisance "complement rather than hinder" the federal goal of providing safe and decent housing for low income families through construction of new housing and rehabilitation of existing structures. *Id.* at 1019. Likewise, the purpose of the state statute authorizing demolition – to protect "citizens from the unfortunate and degrading results of substandard and dangerous housing" – paralleled federal goals. *Id.* (citation omitted).

The district court found unpersuasive HUD's argument that forced compliance with state and local law would be "exceedingly burdensome financially" and would encourage demolition of HUD-acquired buildings. *Id.* The court thought it unlikely that HUD would engage in the sort of brinkmanship that would force demolition rather than comply with local law. *Id.* Further, the district court dismissed the financial burden as a basis for preemption outright. "Moreover, this argument could be used to avoid liability under any state or local law that requires some expenditure of federal monies. The court does not believe that the 'clear conflict' doctrine of the supremacy clause was intended to reach so far."

*Id.*[4]

Affirming the District Court, the Seventh Circuit Court of Appeals held: *"Federal law requires property management in conformity with local law. . . .* HUD properties do not become like some Federal properties, enclaves exempt from local law." *Burroughs v. Hill*, 741 F.2d 1525, 1528 (7th Cir. 1984) (citation omitted) (emphasis added). The Court of Appeals elaborated:

> The supposed pendent state law claims are really claims that the policy of the Housing Act, 12 U.S.C. Sec. 1701 [App. at 26] and ff, requires that when HUD becomes owner of real property located within sovereign states, acting under the General Welfare clause and not under specific Federal constitutional grants of power, *HUD must conform to construction codes, etc., of local law just as the previous but now foreclosed mortgagors had to do. The existence of such a policy of law is not in dispute* and is illustrated by quotes from HUD documents which need not be detailed. . . . *It is therefore plain that plaintiffs can, as they do buttress their Federal claims by references to breaches of local law.*

*Id.* at 1529 (emphasis added). The Seventh Circuit emphasized its ruling that HUD must conform to local law even while disposing of the plaintiffs' claims: "It is not in any way inconsistent to say that *Congress intended HUD officials to conform to local law in their management of foreclosed property* in that location," but did not authorize a

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[4] Finding that the state and local law at issue did not authorize a private action for damages, however, the district court dismissed the suit. *Burroughs*, 564 F.Supp. at 1019.

private cause action for damages. *Id.* at 1531 (emphasis added).

In sum, the established rule of law in the Seventh Circuit requires HUD to comply with reasonable local health and safety codes.

### B. In the Eighth Circuit, HUD Is Exempt from State and Local Law, Creating a Genuine Circuit Split.

As set forth in the Statement of the Case, in response to a facial challenge to the City's Nuisance Abatement Ordinance, Chapter 45 of the St. Paul Legislative Code, the Eighth Circuit enjoined any application of it to properties owned by HUD. Chapter 45, is the City's enforcement mechanism for the local building maintenance code (adopted from a uniform code) and the state fire code (adopted from the Uniform Fire Code). App. at 79. Further, neither the Court of Appeals ruling (enjoining *any* application of Chapter 45) nor its rationale (that the Supremacy Clause shields "the activities of federal installations" from local regulation) depend upon case-specific facts or distinctions. App. at 1-7. Therefore, the rule of law in the Eighth Circuit is now that all HUD properties – however acquired, however held, or however long held – are exempt from all state and local health and safety codes throughout the Eighth Circuit.

HUD argued below that this case is distinguishable from *Burroughs* because HUD has changed its regulations and handbook since the Seventh Circuit case was decided. The changes, however, are immaterial to the holding of *Burroughs*. The ruling in *Burroughs* was that in the National Housing Act, Congress did not authorize the preemption of local health and safety codes; thus the Seventh Circuit and the district court did not rely on the handbook and regulations, but treated them only as indicators of Congressional intent. 741 F.2d at 1529; 564 F.Supp. at 1018. *Burroughs* stands for

the proposition that the NHA requires, and *Congress* intended, that HUD comply with state and local laws. Absent another act of Congress, congressional intent – the touchstone of preemption analysis – is immutable and is not subject to later agency manipulation. At most, HUD's changes reflect a change of opinion by HUD, not a change in the Congressional intent. They do not even go that far, however.

The district court's view in *Burroughs* that HUD-owned property is subject to local housing codes was buttressed by the handbook then in effect, HUD Property Disposition Handbook for 1 to 4 Family Properties, Directive No. 4315.1, §185(d), which stated, "[I]n areas where local housing codes are in effect and are being actively enforced, the repair program is designed to meet local code requirements." *Burroughs*, 564 F. Supp. at 1018. The relevant HUD Handbook, adopted in 1994, now allows for repairs when, "[t]he property needs repair to comply with actively enforced local codes or unrepaired sales are prohibited by such codes or local ordinance." HUD Property Disposition Handbook for 1 to 4 Family Properties, REV-2 (1994), Directive No. 4310.5, §10-11A(4). This change in text does not demonstrate any change in HUD's view of Congressional intent.

The Handbook change came about after a change in the regulation. When *Burroughs* was decided, there was no rule on point, but the prior Handbook, at ¶ 185, Chapter 7, required HUD to "place properties in first-class condition." 741 F.2d at 1536. HUD amended its regulations to allow its properties to be marketed in an "as-is" condition. The rule states, "Properties are sold on an 'as-is' basis, without repairs or warranties." 24 C.F.R. § 291.100(c) (1999); App. at 60. While the new rule clearly does away with the "first-class condition" policy, it does not suggest that HUD may neglect minimum health and safety standards.

The current rule says nothing about preempting local codes. App. at 59-61. On the contrary, when the rule was proposed, HUD stated, "The General Counsel has also determined, as the designated official for HUD under section 6(a) of Executive Order 12612, *Federalism* [App. at 62-68], that the policies contained in this rule do not have federalism implications and, thus are not subject to review under that Order." 56 Fed. Reg. 13996, 14000 (1991). Consequently, HUD cannot credibly argue that the post-*Burroughs* regulatory change evidences a change of its opinion on Congressional intent to preempt.

Finally, the passage of time between *Burroughs* and the present case cannot be argued to diminish the importance of this circuit conflict. This new conflict represents a major rift in the law. The passage of time demonstrates only that HUD did not challenge the established rule of law until this case. HUD's own acquiescence to be bound by local regulation explains the lack of litigation. HUD is the only party in a position to object when someone tries to enforce local regulations against its properties. It appears that after *Burroughs*, HUD did not attempt to assert preemption in a Court of Appeals until now, despite ample opportunities to do so. Everyone, including HUD, followed the rule in *Burroughs* until the present case came along. Thus, it is only a major course change by HUD that brought this case to a head and created the circuit conflict.

## II. THE QUESTION PRESENTED IS IMPORTANT.

Given HUD's pervasive presence in local communities across the nation, and the absence of any regional or local distinctions to justify differential treatment, the Supreme Court must not tolerate this fundamentally unfair circuit split. Review by the Supreme Court is important to the large numbers of people who live in communities among HUD-acquired residences. To the extent HUD is free to maintain

repossessed homes in a nuisance condition, the neighbors lose their liberty to enjoy their homes in peace. Exempting HUD's residential property from state and local nuisance laws "runs counter to modern democratic notions of the moral responsibility of the State." *See Larson v. Domestic & Foreign Commerce Corp.* 337 U.S. 682, 724, n.13 (1949) (Frankfurter, J., dissenting).

HUD carries on its operations nationally, and at any given point in time, owns "tens of thousands of single-family homes throughout the country" in practically all significant population centers. *See* Brief for Appellee at 3, *United States v. City of St. Paul*, 258 F.3d 750 (8th Cir. 2001) (No. 00-2366). The physical condition of a property has an impact on all its neighbors. A nuisance property can be a vermin harborage, a fire risk, an invitation for criminal behavior such as drug dealing and prostitution, and an eyesore. This truth does not distinguish between HUD-acquired properties and privately owned ones. The identity of the owner of the blighted property is irrelevant to the neighbors who must bear the brunt of the nuisance and blight. HUD's presence is ubiquitous; it owns homes in virtually every community in the nation. Thus every community in the nation will be harmed by the decision of the Eighth Circuit.

The circuit split between two neighboring circuits, poses the further problem that neighboring cities will have different rules. From Duluth/Superior in the north, through Davenport/Rock Island, to Saint Louis/East Saint Louis, and many points in between, HUD properties will operate under different rules in neighboring cities that function as one economic unit.

Communities in the Eighth Circuit are particularly hard hit due to the overbreadth of the injunction. It was issued as a matter of law, and is not limited by any case specific facts. Now in the communities in the Eighth Circuit, no local or state health and safety regulations can be enforced against

HUD acquired properties. The injunction is not limited in any manner. It prohibits enforcement of all nuisance abatement laws, including those dealing with serious health and safety threats. And, it is permanent.

The issue of preemption needs to be addressed now. Delay poses an immediate risk to the health and safety of real people. Inspectors in Saint Paul, as well as all other cities, deal with these health and safety issues on a daily basis. A building that is in danger of collapse, or that is a rat harborage, or that is a fire hazard, must be addressed promptly to avoid serious, and unnecessary risks to the public welfare.

The existence of nuisance properties is destabilizing to communities and a direct threat to redevelopment efforts. If homes in a neighborhood become dilapidated and blighted, they lower the willingness of people to live in that neighborhood. A reasonably well kept house or apartment building will add value to neighboring properties, while a poorly maintained property will lower values. When the condition of a property becomes so poor that it constitutes a nuisance under state and local law, it not only lowers neighboring property values, but it harms the neighbors' liberty right to use and enjoy their own homes.

If, as the Eighth Circuit decided, cities and states cannot even monitor the condition of HUD-acquired property, a vacuum is created and no one enforces the minimum standards. Due to this decision, if a HUD home suffers fire damage, the city cannot inspect to determine the safety of the building; if crimes such as drug dealing and prostitution occur on a vacant HUD-acquired property, the city has no right to order the windows and doors of the building secured; if a HUD-acquired property becomes an attractive nuisance, the city cannot even post a notice that the property is dangerous.

To protect against such dangers, citizens have successfully prevailed upon their state and local governments

to establish health and safety laws to address the problem. Most state and local governments have laws that mandate minimum standards for the physical condition of residences. State and local governments enforce these codes for the good of the public using a continuum of process, from inspection, to warnings, to citations, and ultimately, to abatement actions.

HUD argues that it can be trusted to adequately maintain the properties it owns, but at the same time insists that it need not and will not meet local codes. Must the neighbors then go through the federal bureaucracy to get something done if the property becomes a nuisance? The practical consequence of the Eighth Circuit's decision is just that. The decision leaves the neighbors with no recourse but in the labyrinth of HUD's bureaucracy, which is significantly less responsive than local officials on this type of local problem. Thus, the Eighth Circuit's misreading of Congressional intent comes with excessive costs to the communities and people of the nation.

In summary, nuisance properties, by definition, inflict injury upon neighboring properties. *See* BLACK'S LAW DICTIONARY 1065 (6th Ed., 1990); 58 AM.JUR.2D p. 671, *Nuisances* §2 (1989). Nuisance properties present a threat to health and safety in the nation's most vulnerable communities and thwart efforts to stabilize, redevelop, and maintain low income communities. While the enforcement of uniform building and fire codes gives local governments a fighting chance to preserve and redevelop threatened neighborhoods, the problem is intractable if the properties are untouchable. For the families forced to share a block with a nuisance property, the problem is not an abstraction, an actuarial sum, or an operating cost. Its effect on their lives is real and immediate, lowering their standard of living and threatening their health and safety.

## III. THE SWEEPING INTRUSION INTO STATE AUTHORITY CALLS FOR SUPREME COURT REVIEW.

In addition to the importance to the public of the impact of the circuit split, this case needs review because the Eighth Circuit, in conflict with the Supreme Court's recent federalism cases, ruled that an agency can preempt state law without a clear statement to that effect in a duly enacted statute or rule. The decision by the Eighth Circuit holds that merely incidental cost considerations are enough of an "interference" to create preemption. App. at 5-7. If this is so, then agencies can preempt at will every state or local regulation because all regulation necessarily carries some level of cost. The effect of the Eighth Circuit's decision is to remove any meaningful limitation on a federal agency's power to exempt itself from reasonable, and traditionally local, regulation of general application. In this case HUD did so without any express Congressional authorization and without an express statement of preemption in the rule.

Principles of federalism require that an agency not preempt state law without a clear Congressional statement to that effect. The Supreme Court addressed a similar issue last term in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). In that case the Court held that an administrator cannot expand on an unclear statute at the expense of federalism. The Court stated:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645

> (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

*SWANCC*, 531 U.S. at 172-73. The Court went on to say it would "thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference." *Id.* at 174.

By the same token, an agency should not be allowed to preempt state law, where neither the federal statute nor the regulations speak directly to the issue, and where the preemption would raise serious federalism concerns by invalidating traditional state police power. Here, as in *SWANCC,* the government's position would result in a "significant impingement of the states' traditional and primary power over land and water use" without any signal from Congress that this was intended. *See id.* at 161.

In fact, prior to this litigation, HUD's position was that the regulations did not preempt state and local law. HUD relies upon 24 C.F.R. § 291.100(c) (1999) (App. at 60) for the proposition that its properties are to be marketed in an "as-is" condition. The rule states, "Properties are sold on an 'as-is' basis, without repairs or warranties." The rule says nothing about preempting local codes. On the contrary, when the rule was proposed, HUD stated, "The General Counsel has also determined, as the designated official for HUD under section 6(a) of Executive Order 12612, *Federalism* [App. at 62-68], that the policies contained in this rule do not have federalism implications and, thus are not subject to review under that Order." 56 Fed. Reg. 13996, 14000 (1991). HUD, without any change in Congressional authorization, changed its position, and now claims that the regulations and informal

handbook do preempt state and local law. This about face is anything but casual; it is a bold and sweeping intrusion into the traditional realm of state and local regulation of land use. This clearly demonstrates the abuse that results from allowing unclear agency pronouncements to preempt local regulation.

The Court in *SWANCC* refused to defer to a *clear agency regulation* in the absence of clear Congressional authorization. *Id.* at 172. Where, as here, clear Congressional authorization is lacking, it is an affront to federalism to preempt state authority by *unclear and informal policies* of the agency.

## CONCLUSION

Consequently, the City of Saint Paul respectfully requests that the Court grant its petition for a writ of certiorari.

Respectfully Submitted,

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United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,
v.
CITY OF ST. PAUL, Appellant.

**No. 00-2366.**

258 F.3d 750

Submitted: Feb. 12, 2001.
Filed: Aug. 2, 2001.

Before RICHARD S. ARNOLD, HANSEN, Circuit Judges, and KORNMANN,[1] District Judge.

KORNMANN, District Judge.

Congress has affirmed as a national goal "a decent home and a suitable living environment for every American Family." 12 U.S.C. § 1701t. The United States Department of Housing and Urban Development ("HUD") insures certain mortgages on single family homes (12 U.S.C. § 1709) to encourage private entities to lend money to home buyers who would otherwise not qualify for a conventional loan and mortgage. In furtherance of that goal, HUD is obligated to ensure maximum returns to the Single Family Mortgage Insurance Fund (" Fund") as created by the National Housing Act, 12 U.S.C. §§ 1701- 1750g. The object is to protect assets of the federal government.

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[1] The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota, sitting by designation.

HUD insured just such a mortgage on a home in St. Paul, Minnesota. The mortgagor defaulted and abandoned the house. The City of St. Paul ("St. Paul") learned of the vacant house, conducted an inspection in August of 1998, and found various St. Paul code violations. The mortgagee foreclosed, obtained a judgment of foreclosure, submitted a claim to HUD to cover the defaults of the mortgagor, and, in late April of 1999, deeded the house to HUD. HUD immediately acted to inspect the house, cap the natural gas line, disconnect the electricity, lock all windows and doors, and mow the grass. HUD acted later to remove snow from the sidewalk and driveway. HUD developed a marketing plan to sell the house and caused the house to be appraised. HUD policies are to attempt to sell acquired houses as quickly as possible at affordable prices to owner occupants. *See* 56 Fed.Reg. 13,996 (April 4, 1991). HUD followed these policies in this case.

St. Paul again inspected the house on July 22, 1999, and, in early August, sent HUD an order for HUD to abate the claimed nuisance building. St. Paul relied on its nuisance abatement code. St. Paul posted on the house a written notice to advise of the demands being made, advise of certain deadlines, and advise that the house was in a "nuisance condition." St. Paul conducted another inspection and notified HUD on August 26 of required repairs costing up to $40,000. St. Paul ordered HUD to either make the repairs or obtain a St. Paul building permit to do so and post a $2,000 bond, setting a deadline of September 7, 1999. HUD was directed to, among other things, replace all floor coverings, including carpet, completely rebuild the garage, install new storms and screens for all windows and doors, repaint the exterior and interior of the house, and rewire the basement with switches and outlets. HUD was told that, if it failed to comply, the house would be demolished.

St. Paul next served HUD with notice of a hearing. A St. Paul official conducted such hearing on October 19. HUD

did not appear. On October 27, HUD obtained a buyer for cash ($25,009.00) who intended to make repairs and then occupy the property as his principal residence. The St. Paul City Council conducted a hearing on October 27. A marketing contractor for HUD appeared, telling St. Paul about the acceptance of the offer and the fact that the buyer would be required to make all repairs previously required by St. Paul. The city council nevertheless set a deadline of November 15 for HUD to avoid demolition, the expenses of which would be charged to HUD. HUD requested in writing that St. Paul reconsider and not proceed with demolition. The proposed purchaser also contacted the mayor's office, seeking to prevent demolition. Reconsideration was denied. On December 6, St. Paul told HUD it was proceeding with demolition.

On February 3, 2000, the United States instituted this declaratory judgment action against St. Paul. On February 8, St. Paul's demolition contractor obtained a city permit to demolish. On February 14, the United States obtained a temporary restraining order. The parties filed cross motions for summary judgment. The district court[2] granted summary judgment and entered a permanent injunction against St. Paul. The district court held that the St. Paul ordinance conflicts with the goals of the National Housing Act, conflicts with the HUD policy of "as is" dispositions of acquired property which policy is designed to avoid needlessly spending federal funds, and conflicts with the authority and discretion of HUD in the disposition of property.

On May 27, 2000, HUD finally closed the sale to the buyer who had been obtained earlier and who had his funds in escrow for seven months. The buyer was indeed required by HUD to comply with the St. Paul ordinance, despite the fact that the costs to renovate had increased.

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[2] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

The injunction prohibits St. Paul from ordering HUD in the future to abate any alleged nuisance conditions as to property acquired by HUD, from ordering the demolition of HUD property, and from taking any other action inconsistent with the authority conferred upon HUD by the federal statutes and regulations, including any mandatory St. Paul inspections that would interfere with the use or disposition of HUD property.

The League of Minnesota Cities, the City of Minneapolis, and the International Municipal Lawyers Association have all filed *amicus curiae* briefs supporting the arguments of St. Paul.

The question we decide is whether St. Paul's nuisance abatement code impermissibly interferes with the operation of the National Housing Act. "It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation. EPA v. State Water Resources Control Board, 426 U.S. 200, 211, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976); accord, Hancock v. Train, 426 U.S. 167, 178-179, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976); Mayo v. United States, 319 U.S. 441, 445, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943)." Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988). The general rule established in McCulloch v. Maryland, 4 Wheat. 316, 436, 4 L.Ed. 579 (1819), is that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." We must be cautious as we apply this language.

The Secretary of HUD is authorized "to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion" any properties conveyed to the Secretary. 12 U.S.C. § 1710(g). HUD regulations have, since October 16, 1991, provided that homes acquired "will be

offered for sale in 'as-is' condition ..." 24 C.F.R. § 291.100(c)(1), (2) and (3). Prior to the mid-1970's, the HUD practice was to make extensive repairs to acquired houses prior to marketing them. In Burroughs v. Hills, 741 F.2d 1525 (7th Cir.1984), facts are set forth to show that HUD had determined that a house in Chicago had a fair market value of $40,000.00 and needed repairs of $17,389.00. During the 18 months HUD owned the house it was unoccupied and subject to frequent acts of vandalism. HUD finally sold the house to the city of Chicago for $1.00 on July 19, 1976. Perhaps due in part to this experience and many other similar experiences, the HUD practice of making extensive repairs was abandoned; the costs of repairs when paid by the federal government (from the Fund) were much higher than private parties faced. Many buyers desire to supply "sweat equity", i.e. make their own repairs. In many cases where HUD had made expensive repairs, the houses were still subject to vandalism. HUD also wished to avoid the great expense of carefully monitoring the repair process in an attempt to prevent waste and fraud. At any given time, HUD has tens of thousands of similar homes in "inventory" throughout the country. In short, HUD determined that its previous practice of substantially repairing homes was a failure. In addition, the costs to buyers from HUD became prohibitively high, frustrating the purpose of the Act. A HUD handbook tells us that the "as-is" sales approach is the preferred disposition technique, stating, however, that a property "may be programmed for repairs when ... the property needs repair to comply with actively enforced local codes or unrepaired sales are prohibited by such codes or local ordinance." This handbook, although not adopted by administrative rule subject to notice and comment, is entitled to notice as the agency's interpretation of its own regulations and should be accepted by us unless there is a showing that the handbook is unreasonable or inconsistent with statutory authority. Fairfax Nursing Center, Inc. v. Califano, 590 F.2d 1297, 1301 (4th

Cir. 1979). The HUD handbook states that "properties are to be sold on an 'as-is' basis, without repairs or warranties." Property Disposition Handbook, Directive No. 4310.5, § 6-19m; *www.hudclips.org*. The handbook further instructs that a field office "may undertake limited repairs prior to selling certain properties. Repairs should be limited to minimum essential items to comply with HUD mortgage insurance criteria, or otherwise comply with actively enforced local codes. This technique should not be used routinely and only on an exception basis." These various provisions, while written in sometimes contradictory phrases, are nevertheless sufficiently clear that it is HUD and not a municipality or other local unit of government who is to make these decisions. In 1998, the National Housing Act was amended, granting HUD even greater authority. "The Secretary may sell real ... property acquired by the Secretary ... on such terms and conditions as the Secretary may prescribe." Pub.L. 105-276, Title VI, § 601(d), 112 Stat. 2670 (1998) (codified at 12 U.S.C. § 1710(g)).

The parties cite to 42 U.S.C. § 3535(i)(1) with varying interpretations. The subsection authorizes the Secretary of HUD to foreclose on any property or commence any action to protect or enforce any right conferred ... by any law, contract or other agreement, and bid for and purchase at any foreclosure or any other sale any property in connection with which [the Secretary] has made a loan or grant. In the event of any such acquisition, the Secretary may, notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, complete, administer, remodel and convert, dispose of, lease, and otherwise deal with such property; *provided,* that any such acquisition of real property shall not deprive any State or political subdivision thereof of its civil or criminal jurisdiction in and over such property or impair the civil rights under the State or local laws of the inhabitants on such property ...

St. Paul argues that the subsection provides clear and unambiguous authorization for St. Paul to apply its nuisance abatement ordinance to HUD. We reject this argument. We first note that the statute applies only when HUD has purchased property by means of a "foreclosure or any other sale" in cases where HUD has made a loan. HUD made no loan and did not purchase this house at a foreclosure or other sale. In addition, we agree with the rationale of United States v. Chester, 144 F.2d 415 (3rd Cir.1944), where a nearly identical statute, the then existing version of 42 U.S.C. § 1547, was interpreted. The purpose of the statute was to make clear that certain federal property as acquired was not to be considered a "federal enclave" so as to deprive the host state of all civil and criminal jurisdiction. There is no claim in the present case that this HUD acquired house was ever a federal enclave. As expressed in Chester, the statutory language is not to be utilized to "impede or prevent the effectuation of the purpose for which" the house was acquired by HUD. Id. at 421-422.

We agree also with the rationale of Oklahoma City v. Sanders, 94 F.2d 323 (10th Cir.1938). HUD must be able to carry out its federal functions in a relatively uniform fashion. HUD cannot be subjected to a vast multitude of municipal ordinances throughout the United States which ordinances require the federal government to spend federal funds, post bonds, and obtain a local building permit, with HUD suffering the prospect of destruction of federal property for failure to comply with local ordinances. The St. Paul ordinance as applied to HUD retards, impedes, burdens and interferes with the operations of a constitutional federal law, the National Housing Act. The impact of the St. Paul ordinance is not simply incidental. It is intrusive as to HUD.

We reject the contention that the injunction is overly broad and we affirm the district court.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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United States of America, Civil File No. 00-258 (MJD)

Plaintiff,

v.

The City of Saint Paul, MEMORANDUM OPINION AND ORDER

Defendant.

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Gregory G. Brooker, Assistant U.S. Attorney on behalf of HUD.
Meghan L. Riley, Assistant City Attorney on behalf of The City.

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## BACKGROUND

On April 22, 1999, the Department of Housing and Urban Development (hereinafter "HUD") acquired a home located at 1328 Minnehaha Avenue in Saint Paul. This single family home was acquired under the "Single Family Mortgage Insurance Program," a program created by Congress in the National Housing Act, 12 U.S.C. §§ 1701-1750g. Under this program, homes are to be immediately marketed at affordable prices. 56 Fed. Reg. 13,996 (1991). HUD regulations also provide that homes will not be renovated, rather they "will be offered for sale in 'as-is' condition..." 24 C.F.R. § 291.100(c)(1), (2) & (3) (1999). HUD and First Preston Management, Inc. (hereinafter "First Preston"), the contractor hired by HUD to manage and market HUD homes, began marketing the house after it was acquired.

On August 6, 1999, the City of Saint Paul (hereinafter the "City") issued to the Secretary of HUD an "Order to Abate Nuisance Property." Sullivan Aff., Ex. B. This Order stated that a City inspector had determined that the home at 1328 Minnehaha Avenue was a "nuisance building" pursuant to Chapter 45 of the St. Paul Legislative Code[1] (hereinafter the "Code"). The Order further provided if HUD did not correct the nuisance conditions within fifteen days, the City was authorized to begin the process to demolish and raze the home. At the same time the Order was issued, the City inspector posted a placard on the home declaring that the home is a "nuisance condition." Id.

On August 26, 1999, a code compliance inspection was conducted on the Minnehaha home. The repairs required by the City inspector were not limited to correcting immediate health and safety problems but included many modernization and renovation repairs, such as replacing floor coverings, repairing the garage, new storms and screens for all doors and windows and painting the interior and exterior of the home. The estimated cost of making the required repairs was about $30,000 to $40,000.

Because HUD did not respond to the Code compliance inspection by either posting a bond, acquiring building permits or by beginning the repairs, and because this case involved the possible demolition of the home, the City initiated its Substantial Abatement procedures set forth in Chapter 45.11 of the Code. Pursuant to the Code, if remedial action is not taken within the time prescribed, the matter is referred to the City Council, who, after a public hearing, may order the City to abate the nuisance and to charge all costs to

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[1] Pursuant to the City ordinances, a "nuisance building" is defined as a vacant building or portion of a vacant building that has multiple housing or building code violations which has conditions constituting material endangerment or which has a documented and confirmed history of blight on the community. St. Paul Code, § 45.02.

the owner. Code, § 45.11(1)(f). An abatement hearing is then scheduled before the City council. Id. § 45.11(3). Notice is then sent to the owner. Id. § 45.11(4). Prior to the hearing, a legislative hearing officer shall provide the owner with an opportunity to meet and informally discuss the matter. Id. § 45.11(4a). The legislative hearing officer may then make a recommendation to the City Council. Id. In this case, a meeting before the legislative hearing officer was scheduled for October 19, 1999. HUD failed to appear at this hearing. Because HUD failed to appear, the legislative hearing officer recommended that the City Council pass a resolution, ordering HUD to repair or remove the building within fifteen (15) days.

On October 27, 1999, HUD, received an offer of $25,009 to purchase the home from Mr. Keith P. Burg. Mr. Burg is aware of the Code compliance issues and is able and willing to make all of the repairs required by the City. Burg Aff. ¶¶ 4-7. Also on October 27, 1999, the City Council held a hearing to consider demolishing the Minnehaha home. Prior to the hearing, Mr. Burg talked with City officials regarding his offer to purchase the Minnehaha home and his ability to fund the necessary repairs. Burg Aff. ¶ 12. At the hearing, First Preston informed the City Council of Mr. Burg's offer. However, the City Council nonetheless passed a resolution ordering HUD to repair or remove the building within 15 days, based upon one Council member's concern that the prospective owner was incapable of rehabilitating the home. Sullivan Aff., Ex. H. Both HUD and Mr. Burg have unsuccessfully attempted to request that the Order to demolish the home be reconsidered. As no repairs were made as of November 15, 1999, the City initiated demolition procedures. Riley Aff., Ex. A ¶ 25.

On February 3, 2000, the United States, on behalf of HUD filed a Complaint seeking Declaratory Judgment against the City. HUD asserts that the Supremacy Clause of the United States Constitution and preemption principles prevent

the City from demolishing the property located at 1328 Minnehaha Avenue in Saint Paul. The United States seeks a permanent injunction enjoining the City from ordering the Secretary of HUD to make extended renovations to HUD-owned homes under the City's nuisance abatement ordinance and from demolishing homes owned by HUD where the ordered renovations have not been made.

The Minnehaha home was scheduled for demolition on or around February 14, 2000, pursuant to the City's Nuisance Abatement Ordinance. On February 14, 2000, HUD obtained a Temporary Restraining Order (TRO), restraining the City from demolishing the property until the disposition of the declaratory action could be determined. This matter is before the Court on the parties' cross-motions for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

## DISCUSSION

A. HUD's Immunity from Local Regulations under the Supremacy Clause

HUD alleges that the Intergovernmental Immunity Doctrine, founded in the Supremacy Clause, immunizes HUD from the City's actions in this case, relying on the seminal opinion in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). "The primary purpose which the supremacy of the Federal Government serves is the carrying out, free from individual state control or interference, the measures of government created ... for the benefit of [all]." Id. at 435. The focus in Intergovernmental Immunity cases is not on the validity of the state or local law, but rather on the effect such laws have on the operations of the federal government. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 188 (1988)(J. White dissenting). In other words, the inquiry is whether the state or local law would "retard, impede, burden,

or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." M'Culloch, at 435.

HUD argues that the City's Codes do interfere and burden the goal of the National Housing Act to ensure a "decent home and a suitable living environment for every American family." 12 U.S.C. § 1701t. To assist in achieving this goal, Congress established HUD to insure mortgages on single-family homes. 12 U.S.C. § 1709. Congress also granted HUD broad authority to dispose of homes it acquires under the Single Family Mortgage Program.

> Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, the Secretary shall have power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any properties conveyed to him in exchange for debentures and certificates of claims as provided in this section . . . The Secretary shall, by regulation, carry out a program of sales of such properties and shall develop and implement appropriate credit terms and standards to be used in carrying out the program . . . The Secretary may sell real and personal property acquired by the Secretary pursuant to the provision of this chapter on such terms and conditions as the Secretary may prescribe.
>
> 12 U.S.C. § 1710g.

The regulations promulgated pursuant to the National Housing Act require only that hazardous conditions must be immediately repaired. HUD Ex. A., Sullivan Aff. ¶ 15. As noted earlier, homes are then sold on an "as-is" basis. 24 C.F.R. § 291.100(c). HUD asserts that previously, its regulations required that more extensive renovations prior to sale were to be made. HUD Ex. E, McCloskey Aff. ¶ 3. But

for a number of reasons[2], HUD eventually changed its regulations in the mid-1970's, providing that the homes be sold "as-is" in order to "dispose of properties in a manner that expands homeownership opportunities, strengthens neighborhoods and communities, and ensures maximum return to the mortgage insurance funds." Id. ¶ 4; 24 C.F.R. § 291.1(2).

HUD argues that as illustrated by the facts of this case, the City's Code, which would require HUD to expend funds on repairs, interferes and impedes HUD's rules and regarding the disposition of its properties and the goals of Congress.

In the case of Commonwealth of Massachusetts v. Hills, 437 F.Supp. 351 (D. Mass. 1977), the court addressed a similar issue as that involved here. In that case, the Secretary of HUD was charged with violating a state sanitary code in a home acquired by HUD under the Single Family Mortgage Insurance Program. The court held that as Congress vested the authority to act in the Secretary, "the Secretary was not subject to regulation by the state legislature by means of the State Sanitary Code. Consequently, she is not subject to criminal prosecution for violation of the Sanitary Code . . . To allow subjection to such prosecution would interfere with the HUD Secretary's official duties in maintaining property acquired by HUD as authorized by . . . the National Housing Act. . ." Hills, 437 F.Supp. at 353.

The City asserts that the proper Supremacy Clause analysis requires this Court to determine whether state law is incompatible with the action of the federal government and does not provide immunity to HUD. It argues that unlike federally owned property such as a courthouse, HUD homes

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[2] HUD determined that extensive renovations and cosmetic repairs were not cost-effective because purchasers do not assign as much value to such repairs. In addition, such repairs were not cost-effective as many repairs were damaged by vandalism. HUD also experienced problems with subcontractors, and had difficulty monitoring contractors to ensure the proper work was done, and to avoid fraud. McCloskey Aff. ¶¶ 6-12.

are not used for the purposes of execution of federally enumerated powers. Therefore, HUD is not entitled to immunity from its Code. In support, the City cites to Burroughs v. Hills, 741 F.2d 1525, 1528 (7th Cir. 1984).

Burroughs, however, is not applicable here because it was decided when HUD regulations required property management to conform to local regulation. Id., at 1528. As has been shown by HUD, the regulations no longer require that repairs be made to homes prior to sale, nor do the regulations explicitly provide that HUD must comply with local housing codes. Although there is no case on point, HUD argues that the principles set forth In M'Culloch and its progeny nonetheless support the application of Intergovernmental Immunity in this case. The Court agrees.

In M'Culloch, the Supreme Court addressed the issue of whether the State of Maryland could constitutionally impose operational taxes upon a federal bank located in Baltimore. The Court first recognized that establishing a bank was not among the enumerated powers granted by the Constitution, but nonetheless held that the government was constitutionally empowered to create a bank. The Court further recognized that the state has the power to tax, but that such power may not extend to the federal government pursuant to the Supremacy Clause.

> If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make the government dependent on the states.

Id. at 432. The Supreme Court thus held that

> [t]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

Id. at 436.

In this case, Congress has created a federal program to ensure decent homes for American families. Pursuant to this goal, HUD has found a buyer who is willing to purchase and repair the Minnehaha home in accordance with the City's Codes. Demolition of the Minnehaha home pursuant to the Codes is a clear example that the Codes do interfere and burden HUD's goals.

The City also argues that in delegating authority to the Secretary of HUD, Congress acknowledged the ability of state and local governments to regulate federally owned properties.

> Except as such authority is otherwise expressly provided in any Act administered by the Secretary, the Secretary is authorized to
>
> (a) ... purchase at any foreclosure or any other sale any property in connection with which he has made a loan or grant. In the event of any such acquisition, the Secretary may, notwithstanding any other provision of law relating to the acquisition, handling, or disposal or real property by the United States, complete administer, remodel, and convert, dispose of, lease and otherwise deal with, such property:

> Provided, That any such acquisition of real property shall not deprive any State or political subdivisions thereof of its civil or criminal jurisdiction in and over such property.

42 U.S.C. § 3535(i)(1998)(emphasis added). The City claims that this statute clearly evidences Congress' expressed intent that HUD-acquired properties are subject to state and local regulations. The City misinterprets the emphasized language of Section 3535(i), however. Rather than evince Congressional intent that HUD-owned homes are subject to local code ordinances, such language is intended to make clear that HUD-owned homes are not federal enclaves, therefore residents of such homes are allowed to vote, and local police may make arrests. See, United States v. Chester, 144 F.2d 415 (3rd Cir. 1944); Oklahoma City v. Sanders, 94 F.2d 323 (10th Cir. 1938).

The City further asserts that state and local housing regulations can coexist with federal law, and that in this case, the City's Codes do not conflict with federal law. For example, it argues that if HUD responds to the Order to Abate Nuisance with evidence of a purchaser who is ready and able to make the necessary repairs, an extension of time may be granted to allow the owner to close on the property. The City further asserts that if evidence of a pending sale is brought to the hearing before the legislative hearing officer, HUD is granted more time to close the sale. The City claims that HUD did not take any action in response to the City's Order to Abate Nuisance, and that this lack of response combined with no change in the property caused the City to initiate procedures to abate on its own. The City contends that any conflict HUD perceives is a result of HUD's inaction in responding to the Order.

The City further argues that if HUD makes the repairs, the price of the repairs will be reflected in the purchase price of the property. The City asserts that if HUD doesn't make

the repairs and sells the home at a much lower price, the homeowner will eventually have to make the necessary repairs. The City claims that a delay in making repairs to a dilapidated condition will cause the condition to further deteriorate, thereby increasing the cost of repairs for the homeowner.

The Court finds that the position of the City is misplaced. In addressing the issue of Intergovernmental Immunity, the issue is whether the City's Codes interfere or burden HUD's duties to dispose of homes in a manner to further the goals of Congress. Given the broad authority delegated to HUD by Congress, HUD acted within its powers to determine that the homes it acquired should be sold an on as-is basis. The City's Codes would interfere with this determination by requiring HUD to make repairs the City deems necessary, rather than HUD. The Codes further interfere and burden HUD by requiring them to find buyers within time frames set by the Codes, or by forcing HUD to post performance bonds.

The Court thus agrees that HUD, in disposing of properties pursuant to federal law and regulations, must be immune from state or local law, when such law interferes or burdens HUD. In so deciding, this Court is mindful of the fact that HUD acquires tens of thousands of homes across the country every year. For HUD to carry out its congressionally mandated duties, it must be free to operate its programs in any manner the Secretary deems appropriate without the concern that its regulations may conflict or are not compatible with a particular cities' housing codes.

B. Federal Preemption

In addition to the fact that HUD is immune from local housing codes, HUD is entitled to judgment in this case because the City's Codes actually conflict with applicable federal law and regulations. "When the Federal Government acts within the authority it possesses under the Constitution, it

is empowered to preempt state laws to the extent it is believed that such action is necessary to achieve its purposes." City of New York v. Federal Communications Commission, 486 U.S. 57, 63 (1988). The Supreme Court has recognized a number of ways in which Congress may be understood to have preempted state law, and has also recognized that "a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law." Id. at 63-64.

The City's effort to enforce the Code in this case stands ai an obstacle to the accomplishment and execution of the purposes and objectives of the federal housing programs. Specifically, the Code's abatement ordinance and demolition orders directly conflict with HUD's authority under the National Housing Act, 12 U.S.C. § 1701-1750g, the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 504 (1968) and HUD's property disposition regulations, 24 C.F.R. Part 291 (1999). Under the National Housing Act, Congress specifically delegated to the Secretary of HUD the authority to exercise his discretion in determining what repairs, if any, HUD should make. This authority was subsequently broadened. Pub. L. No. 105-276, Title VI, § 601 (d), 112 Stat. 2670 (1998)(Codified at 12 U.S.C. § 1710g)). Courts have recognized this broad authority afforded the Secretary. See, Booker v. Edwards, 99 F.3d 1165 (D.C. Cir. 1996).

The Code also conflicts with the Housing and Urban Development Act of 1968, by allowing for the destruction of HUD-owned homes during the period that HUD is marketing such property. Finally, it conflicts with HUD's regulations, the main purpose of which is to reduce inventory in a manner to ensure the maximum return to the mortgage insurance fund.

The City argues that compliance with its Codes creates no conflicts with federal laws or regulations because the

purposes of the applicable Codes to ensure that a nuisance condition is abated so that the future homeowner can reside in a safe and healthy living environment. The City asserts that this does not frustrate the goal of the National Housing Act but also works in furtherance of it to provide a "suitable and decent living environment for every American family."

The City further argues that the HUD Handbook 43.10.5 REV-2 (1994) (Hereinafter "Handbook"), Chapter 10, Section III Identifies a procedure for disposal of HUD-acquired properties. The City claims that the Handbook creates an exception to the general rule by acknowledging that local codes may require that repairs be made instead of selling the property in as-is condition. The City contends that the Handbook should be considered part of HUD's regulatory scheme. See e.g., Immigration and Naturalization Service v. National Ctr. For Immigrants' Rights, Inc., 502 U.S. 183 (1991).

The HUD Handbook is for internal use only and is not an agency rule or regulation. See United States v. Hauck, 980 F.2d 611, 614 (10th Cir. 1992). In addition, the provision cited by the City provides that HUD "field offices may undertake limited repairs prior to selling certain properties." (Handbook, City Exh. F, p.6-7) (emphasis added). It further provides that "the as-is sales approach is the preferred disposition technique." Id. Rather than support the City's position in this case, the HUD Handbook is actually consistent with its regulations and recognizes that the Secretary of HUD, not the City, has the discretion to decide which homes should be sold as-is, which should be repaired, and which should be razed. The City's Code directly conflicts with the demolition provision in the Handbook and the regulations by attempting to take the power from the Secretary and give it to the City.

Similarly, the Code policy to postpone the decision to demolish for six months if HUD brings forth evidence of a pending sale also presents a conflict. If HUD were to comply

with this policy it would have to find a purchaser before the hearing officer stage of the ordinance's procedures or risk the City Council ordering a demolition. This requirement of a mandatory local deadline on HUD's process interferes with Congress' broad grant of authority and discretion to the HUD Secretary.

C. Injunctive Relief

Because the Court finds that HUD is immune from the Code's nuisance abatement procedures, and that such local regulation is preempted by federal law and regulations, HUD need only show irreparable harm to entitle it to injunctive relief. Bank One v. Guttau, 190 F.3d 844, 847-848 (8th Cir. 1999) cent. denied, __ S.Ct. __ 2000 WL 177432 (U.S. Apr. 24, 2000).

HUD argues that it is entitled to injunctive relief, as its programs will be irreparably harmed if a permanent injunction is not ordered. HUD asserts that if the home at 1328 Minnehaha is demolished, other HUD homes in the future will be too. This demolition of affordable housing frustrates the goal of the National Housing Act. The Court agrees that HUD will be irreparably harmed if the City is allowed to demolish HUD-owned homes pursuant to its Code. Accordingly, HUD is entitled to injunctive relief.

IT IS HEREBY ORDERED that HUD's Motion for Summary Judgment is GRANTED in its entirety.

IT 15 FURTHER ORDERED that the Secretary of the U.S. Housing & Urban Development ("HUD") or any agent, officer, or employee of HUD is immune from the application of Defendant City of St. Paul's Nuisance Abatement Ordinance, Chapter 45 of the St. Paul Legislative Code, ("Chapter 45") to HUD-acquired homes located in St. Paul and that federal law preempts and makes invalid Chapter 45 as it has been or maybe applied to HUD;

IT IS FURTHER ORDERED that Defendant City of St. Paul is permanently enjoined from 1) ordering the Secretary of HUD or any other agent, officer, or employee of HUD in the future to abate any nuisance conditions that the City has identified in any property owned by HUD; 2) demolishing as a nuisance building any structure located on a property owned by the Secretary of HUD; or 3) taking any other action inconsistent with this Order, including any mandatory inspections that would hinder the use or transfer of HUD-owned properties.

IT IS FURTHER ORDERED that the City of Saint Paul's Motion for Summary Judgment is DENIED.

Date: 5-1-00

/s/
Michael J. Davis
United States District Court

United States District Court,
D. Minnesota.

UNITED STATES of America, Plaintiff,
v.
The CITY OF SAINT PAUL, Defendant.

**No. CIV. 00-258 MJD.**

May 25, 2000.

193 F.R.D. 640

MEMORANDUM OPINION AND ORDER

DAVIS, District Judge.

BACKGROUND

By Order of this Court dated May 1, 2000, this Court granted the Department of Housing and Urban Development's (hereinafter "HUD") motion for summary judgment and granted it permanent injunctive relief. Currently before the Court is the motion of the City of Saint Paul (hereinafter the "City") for a stay of the Court's Order enjoining the City from enforcement of Chapter 45 against HUD-owned properties pending appeal, or in the alternative, for an order modifying the injunctive relief, allowing enforcement of Section 45.12 to be enforced against HUD-owned properties pending appeal.

Rule 62(c) of the Federal Rules of Civil Procedure allow a court "in its discretion [to] suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." The

applicable factors for determining the appropriateness of a stay are: 1) whether the stay applicant has made a strong showing that he/she is likely to succeed on the merits; 2) whether the applicant will be irreparably harmed absent a stay; 3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and 4) whether a stay is in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

1. Success on the merits

As to the first factor, the City argues that it need only show that its appeal involves the determination of substantial and novel legal questions. This argument is not entirely correct. It is true that a court may stay its order pending appeal where its order involves substantial and novel legal questions. However, the movant must still make a showing of likelihood of success on the merits. *See,* Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 113 (8th Cir.1981)("where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less."); *See also,* Ben Oehrleins and Sons and Daughters, Inc. v. Hennepin County, Minnesota, 927 F.Supp. 348, 350 (D.Minn.1996)(success on the merits is nonetheless relevant to stay determination even though order involves substantial and novel legal questions).

The Court agrees that this case involves substantial legal issues. However, the Court finds that the City has not made a sufficient showing of success on the merits, and the equities do not weigh in favor of a stay of all or a portion of this Court's Order.

2. Irreparable Harm

The City argues that absent a stay, it will be irreparably harmed. The City argues that this Court's Order prohibits it

from controlling potential health and safety risks that arise from HUD-owned properties. HUD responds that its regulations require the immediate repair of all hazardous conditions in HUD- owned homes. HUD argues, and the Court agrees, that there is no evidence in the record that any current HUD-owned homes are in need of emergency repairs of hazardous conditions or that any such home is a danger to the public. This factor thus does not weigh in favor of a stay or a modification of the Court's Order.

3. Injury to HUD if Stay is Issued

The City argues that HUD will suffer no injury if the stay is issued because HUD can continue to acquire and sell its homes. HUD responds that if the stay is issued, the City can and will continue to demolish HUD-owned homes. This Court has already found that demolition of HUD-owned homes constitutes irreparable injury. Accordingly, this factor does not weigh in favor of a stay or modification.

4. Public Interest

The City asserts that this factor weighs in favor of a stay, as it is in the public interest to allow it to protect the health and safety of its citizens. HUD argues that the public interest does not support a stay, as it would hamper its ability to market HUD-owned homes--the home located at 1328 Minnehaha Avenue being a clear example. In addition, HUD asserts that the public interest is furthered by an injunction that enforces the U.S. Constitution.

The Court finds that this factor also weighs against the issuance of a stay. The public interest is served by allowing HUD to market its homes without the threat of demolition by the City. In addition, the City has not presented the Court any evidence that HUD will not address emergency hazardous conditions, or that such conditions currently exist.

ACCORDINGLY, IT IS HEREBY ORDERED that the City of St. Paul's Motion for a Stay or Modification of Injunctive Relief is DENIED.

**12 U.S.C. § 1701**

This chapter may be cited as the "National Housing Act."

**12 U.S.C. § 1701j-3. Preemption of due-on-sale prohibitions**

(a) Definitions

For the purpose of this section--

(1) the term "due-on-sale clause" means a contract provision which authorizes a lender, at its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent;

(2) the term "lender" means a person or government agency making a real property loan or any assignee or transferee, in whole or in part, of such a person or agency;

(3) the term "real property loan" means a loan, mortgage, advance, or credit sale secured by a lien on real property, the stock allocated to a dwelling unit in a cooperative housing corporation, or a residential manufactured home, whether real or personal property; and

(4) the term "residential manufactured home" means a manufactured home as defined in section 5402(6) of Title 42 which is used as a residence; and

(5) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, and the Trust Territory of the Pacific Islands.

(b) Loan contract and terms governing execution or enforcement of due-on-sale options and rights and remedies of lenders and borrowers; assumptions of loan rates

(1) Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may, subject to subsection (c) of this

section, enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan.

(2) Except as otherwise provided in subsection (d) of this section, the exercise by the lender of its option pursuant to such a clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract.

(3) In the exercise of its option under a due-on-sale clause, a lender is encouraged to permit an assumption of a real property loan at the existing contract rate or at a rate which is at or below the average between the contract and market rates, and nothing in this section shall be interpreted to prohibit any such assumption.

(c) State prohibitions applicable for prescribed period; subsection (b) provisions applicable upon expiration of such period; loans subject to State and Federal regulation or subsection (b) provisions when authorized by State laws or Federal regulations

(1) In the case of a contract involving a real property loan which was made or assumed, including a transfer of the liened property subject to the real property loan, during the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such State has rendered a decision (or if the highest court has not so decided, the date on which the next highest appellate court has rendered a decision resulting in a final judgment if such decision applies State-wide) prohibiting such exercise, and ending on October 15, 1982, the provisions of subsection (b) of this section shall apply only in the case of a transfer which occurs on or after the expiration of 3 years after October 15, 1982, except that--

(A) a State, by a State law enacted by the State legislature prior to the close of such 3-year period, with respect to real property loans originated in the State by lenders other than national banks, Federal savings and loan associations, Federal

savings banks, and Federal credit unions, may otherwise regulate such contracts, in which case subsection (b) of this section shall apply only if such State law so provides; and

**(B)** the Comptroller of the Currency with respect to real property loans originated by national banks or the National Credit Union Administration Board with respect to real property loans originated by Federal credit unions may, by regulation prescribed prior to the close of such period, otherwise regulate such contracts, in which case subsection (b) of this section shall apply only if such regulation so provides.

**(2)(A)** For any contract to which subsection (b) of this section does not apply pursuant to this subsection, a lender may require any successor or transferee of the borrower to meet customary credit standards applied to loans secured by similar property, and the lender may declare the loan due and payable pursuant to the terms of the contract upon transfer to any successor or transferee of the borrower who fails to meet such customary credit standards.

**(B)** A lender may not exercise its option pursuant to a due-on-sale clause in the case of a transfer of a real property loan which is subject to this subsection where the transfer occurred prior to October 15, 1982.

**(C)** This subsection does not apply to a loan which was originated by a Federal savings and loan association or Federal savings bank.

(d) Exemption of specified transfers or dispositions

With respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, including a lien on the stock allocated to a dwelling unit in a cooperative housing corporation, or on a residential manufactured home, a lender may not exercise its option pursuant to a due-on-sale clause upon--

**(1)** the creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;

(2) the creation of a purchase money security interest for household appliances;

(3) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(4) the granting of a leasehold interest of three years or less not containing an option to purchase;

(5) a transfer to a relative resulting from the death of a borrower;

(6) a transfer where the spouse or children of the borrower become an owner of the property;

(7) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;

(8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or

(9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.

(e) Rules, regulations, and interpretations; future income bearing loans subject to due-on-sale options

(1) The Federal Home Loan Bank Board, in consultation with the Comptroller of the Currency and the National Credit Union Administration Board, is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

(2) Notwithstanding the provisions of subsection (d) of this section, the rules and regulations prescribed under this section may permit a lender to exercise its option pursuant to a due-on-sale clause with respect to a real property loan and any related agreement pursuant to which a borrower obtains the right to receive future income.

(f) Effective date for enforcement of Corporation owned loans with due-on-sale options

The Federal Home Loan Mortgage Corporation (hereinafter referred to as the "Corporation") shall not, prior to July 1, 1983, implement the change in its policy announced on July 2, 1982, with respect to enforcement of due-on-sale clauses in real property loans which are owned in whole or in part by the Corporation.

(g) Balloon payments

Federal Home Loan Bank Board regulations restricting the use of a balloon payment shall not apply to a loan, mortgage, advance, or credit sale to which this section applies.

**12 U.S.C. § 1701t. Congressional affirmation of national goal of decent homes and suitable living environment for American families**

The Congress affirms the national goal, as set forth in section 1441 of Title 42, of "a decent home and a suitable living environment for every American family".

The Congress finds that this goal has not been fully realized for many of the Nation's lower income families; that this is a matter of grave national concern; and that there exist in the public and private sectors of the economy the resources and capabilities necessary to the full realization of this goal.

The Congress declares that in the administration of those housing programs authorized by this Act which are designed to assist families with incomes so low that they could not otherwise decently house themselves, and of other Government programs designed to assist in the provision of housing for such families, the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality; and in the carrying out of such programs there should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques.

**12 U.S.C. § 1707. Definitions**

As used in section 1709 of this title–

**(a)** The term "mortgage" means a first mortgage on real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than ten years to run beyond the maturity date of the mortgage; and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State, in which the real estate is located, together with the credit instruments, if any, secured thereby.

**(b)** The term "mortgagee" includes the original lender under a mortgage, and his successors and assigns approved by the Secretary; and the term "mortgagor" includes the original borrower under a mortgage and his successors and assigns.

**(c)** The term "maturity date" means the date on which the mortgage indebtedness would be extinguished if paid in accordance with periodic payments provided for in the mortgage.

**(d)** The term "State" includes the several States, and Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, American Samoa, and the Virgin Islands.

**(e)** The term "family member" means, with respect to a mortgagor under such section, a child, parent, or grandparent of the mortgagor (or the mortgagor's spouse). In determining whether any of the relationships referred to in the preceding sentence exist, a legally adopted son or daughter of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), and a foster child of an individual, shall be treated as a child of such individual by blood.

**(f) The term "child" means, with respect to a mortgagor under such section, a son, stepson, daughter, or stepdaughter of such mortgagor.**

**12 U.S.C. § 1709-1a. State constitutional and legal limits upon interest chargeable on loans, mortgages, or other interim financing arrangements; applicability; covered arrangements**

**(a)** The provisions of the constitution of any State expressly limiting the amount of interest which may be charged, taken, received, or reserved by certain classes of lenders and the provisions of any law of that State expressly limiting the amount of interest which may be charged, taken, received, or reserved shall not apply to--

**(1)** any loan or mortgage which is secured by a one- to four-family dwelling and which is (A) insured under Title I or II [12 U.S.C.A. § 1702 et seq. or § 1707 et seq.] of the National Housing Act, or (B) insured, guaranteed, or made under chapter 37 of Title 38; or

**(2)** any temporary construction loan or other interim financing if at the time such loan is made or financing is arranged, the intention to obtain permanent financing substantially by means of loans or mortgages so insured, guaranteed, or made is declared.

**(b)** The provisions of this section shall apply to such loans, mortgages, or other interim financing made or executed in any State until the effective date (after June 30, 1976) of a provision of law of that State limiting the amount of interest which may be charged, taken, received, or reserved on such loans, mortgages, or financing.

**12 U.S.C. § 1710. Payment of insurance**

(a) In general

(1) Authorized claims procedures

The Secretary may, in accordance with this subsection and terms and conditions prescribed by the Secretary, pay insurance benefits to a mortgagee for any mortgage insured under section 203 [12 U.S.C.A. § 1709] through any of the following methods:

(A) Assignment of mortgage

The Secretary may pay insurance benefits whenever a mortgage has been in a monetary default for not less than 3 full monthly installments or whenever the mortgagee is entitled to foreclosure for a nonmonetary default. Insurance benefits shall be paid pursuant to this subparagraph only upon the assignment, transfer, and delivery to the Secretary of--

(i) all rights and interests arising under the mortgage;

(ii) all claims of the mortgagee against the mortgagor or others arising out of the mortgage transaction;

(iii) title evidence satisfactory to the Secretary; and

(iv) such records relating to the mortgage transaction as the Secretary may require.

(B) Conveyance of title to property

The Secretary may pay insurance benefits if the mortgagee has acquired title to the mortgaged property through foreclosure or has otherwise acquired such property from the mortgagor after a default upon--

(i) the prompt conveyance to the Secretary of title to the property which meets the standards of the Secretary in force at the time the mortgage was insured and which is evidenced in the manner provided by such standards; and

(ii) the assignment to the Secretary of all claims of the mortgagee against the mortgagor or others, arising out of mortgage transaction or foreclosure proceedings, except such claims as may have been released with the consent of the Secretary.

The Secretary may permit the mortgagee to tender to the Secretary a satisfactory conveyance of title and transfer of possession directly from the mortgagor or other appropriate grantor, and may pay to the mortgagee the insurance benefits to which it would otherwise be entitled if such conveyance had been made to the mortgagee and from the mortgagee to the Secretary.

(C) Claim without conveyance of title

The Secretary may pay insurance benefits upon sale of the mortgaged property at foreclosure where such sale is for at least the fair market value of the property (with appropriate adjustments), as determined by the Secretary, and upon assignment to the Secretary of all claims referred to in clause (ii) of subparagraph (B).

(D) Preforeclosure sale

The Secretary may pay insurance benefits upon the sale of the mortgaged property by the mortgagor after default and the assignment to the Secretary of all claims referred to in clause (ii) of subparagraph (B), if--

**(i)** the sale of the mortgaged property has been approved by the Secretary;

**(ii)** the mortgagee receives an amount at least equal to the fair market value of the property (with appropriate adjustments), as determined by the Secretary; and

**(iii)** the mortgagor has received an appropriate disclosure, as determined by the Secretary.

(2) Payment for loss mitigation

The Secretary may pay insurance benefits to the mortgagee to recompense the mortgagee for all or part of any costs of the mortgagee for taking loss mitigation actions that provide an alternative to foreclosure of a mortgage that is in default (including but not limited to actions such as special forbearance, loan modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under section 204(a)(1)(A) [12 U.S.C.A. § 1710(a)(1)(A)]). No actions taken under this paragraph, nor

any failure to act under this paragraph, by the Secretary or by a mortgagee shall be subject to judicial review.

(3) Determination of claims procedure

The Secretary shall publish guidelines for determining which of the procedures for payment of insurance under paragraph (1) are available to a mortgagee when it claims insurance benefits. At least one of the procedures for payment of insurance benefits specified in paragraph (1)(A) or (1)(B) shall be available to a mortgagee with respect to a mortgage, but the same procedure shall not be required to be available for all of the mortgages held by a mortgagee.

(4) Servicing of assigned mortgages

If a mortgage is assigned to the Secretary under paragraph (1)(A), the Secretary may permit the assigning mortgagee or its servicer to continue to service the mortgage for reasonable compensation and on terms and conditions determined by the Secretary. Neither the Secretary nor any servicer of the mortgage shall be required to forbear from collection of amounts due under the mortgage or otherwise pursue loss mitigation measures.

(5) Calculation of insurance benefits

Insurance benefits shall be paid in accordance with section 520 [12 U.S.C.A. § 1735d] and shall be equal to the original principal obligation of the mortgage (with such additions and deductions as the Secretary determines are appropriate) which was unpaid upon the date of--

**(A)** assignment of the mortgage to the Secretary;

**(B)** the institution of foreclosure proceedings;

**(C)** the acquisition of the property after default other than by foreclosure; or

**(D)** sale of the mortgaged property by the mortgagor.

(6) Forbearance and recasting after default

The mortgagee may, upon such terms and conditions as the Secretary may prescribe--

**(A)** extend the time for the curing of the default and the time for commencing foreclosure proceedings or for

otherwise acquiring title to the mortgaged property, to such timeas the mortgagee determines is necessary and desirable to enable the mortgagor to complete the mortgage payments, including an extension of time beyond the stated maturity of the mortgage, and in the event of a subsequent foreclosure or acquisition of the property by other means the Secretary may include in the amount of insurance benefits an amount equal to any unpaid mortgage interest; or

(B) provide for a modification of the terms of the mortgage for the purpose of recasting, over the remaining term of the mortgage or over such longer period pursuant to guidelines as may be prescribed by the Secretary, the total unpaid amount then due, with the modification to become effective currently or to become effective upon the termination of an agreed-upon extension of the period for curing the default; and the principal amount of the mortgage, as modified, shall be considered the "original principal obligation of the mortgage" for purposes of paragraph (5).

(7) Termination of premium obligation

The obligation of the mortgagee to pay the premium charges for insurance shall cease upon fulfillment of the appropriate requirements under which the Secretary may pay insurance benefits, as described in paragraph (1). The Secretary may also terminate the mortgagee's obligation to pay mortgage insurance premiums upon receipt of an application filed by the mortgagee for insurance benefits under paragraph (1), or in the event the contract of insurance is terminated pursuant to section 229 [12 U.S.C.A. § 1715t].

(8) Effect on payment of insurance benefits under section 230

Nothing in this section shall limit the authority of the Secretary to pay insurance benefits under section 230 [12 U.S.C.A. § 1715u].

(9) Treatment of mortgage assignment program

Notwithstanding any other provision of law, or the Amended Stipulation entered as a consent decree on

November 8, 1979, in Ferrell v. Cuomo, No. 73 C 334 (N.D. Ill.), or any other order intended to require the Secretary to operate the program of mortgage assignment and forbearance that was operated by the Secretary pursuant to the Amended Stipulation and under the authority of section 230 [12 U.S.C.A. § 1715u], prior to its amendment by section 407(b) of The Balanced Budget Downpayment Act, I (Public Law 104-99; 110 Stat. 45) [Pub.L. 104-99, Title IV, § 407(b), Jan. 26, 1996, 110 Stat. 45], no mortgage assigned under this section may be included in any mortgage foreclosure avoidance program that is the same or substantially equivalent to such a program of mortgage assignment and forbearance.

(b) Consent to release of mortgagor or property

The Secretary may at any time, under such terms and conditions as he may prescribe, consent to the release of the mortgagor from his liability under the mortgage or the credit instrument secured thereby, or consent to the release of parts of the mortgaged property from the lien of the mortgage.

(c) Debentures; form and amount

Debentures issued under this section--

(1) shall be in such form and amounts;

(2) shall be subject to such terms and conditions;

(3) shall include such provisions for redemption, if any, as may be prescribed by the Secretary of Housing and Urban Development, with the approval of the Secretary of the Treasury; and

(4) may be in book entry or certificated registered form, or such other form as the Secretary of Housing and Urban Development may prescribe in regulations.

(d) Debentures; execution; negotiability; terms; tax exemptions

The debentures issued under this section to any mortagee [FN1] with respect to mortgages insured under section 1709 of this title shall be issued in the name of the Mutual Mortgage Insurance Fund as obligor and shall be negotiable, and, if in book entry form, transferable, in the manner

described by the Secretary in regulations. All such debentures shall be dated as of the date foreclosure proceedings were instituted, or the property was otherwise acquired by the mortgagee after default: Provided, That debentures issued pursuant to claims for insurance filed on or after September 2, 1964 shall be dated as of the date of default or as of such later date as the Secretary, in his discretion, may establish by regulation. The debentures shall bear interest from such date at a rate established by the Secretary pursuant to section 1715o of this title, payable semiannually on the 1st day of January and the 1st day of July of each year, and shall mature twenty years after the date thereof. Such debentures as are issued in exchange for property covered by mortgages insured under section 1709 or section 1713 of this title prior to February 3, 1938 shall be subject only to such Federal, State, and local taxes as the mortgages in exchange for which they are issued would be subject to in the hands of the holder of the debentures and shall be a liability of the Mutual Mortgage Insurance Fund, but such debentures shall be fully and unconditionally guaranteed as to principal and interest by the United States; but any mortgagee entitled to receive any such debentures may elect to receive in lieu thereof a cash adjustment and debentures issued as hereinafter provided and bearing the current rate of interest. Such debentures as are issued in exchange for property covered by the mortgages insured after February 3, 1938, shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; and such debentures shall be paid out of the Mutual Mortgage Insurance Fund, which shall be primarily liable therefor, and they shall be fully and unconditionally guaranteed as to principal and interest by the United States, and, in the case of debentures issued in certificated registered form, such

guaranty shall be expressed on the face of the debentures. In the event that the Mutual Mortgage Insurance Fund fails to pay upon demand, when due, the principal of or interest on any debentures issued under this section, the Secretary of the Treasury shall pay to the holders the amount thereof which is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such debentures.

(e) Certificate of claim

(1) Subject to paragraph (2), the certificate of claim issued by the Secretary to any mortgagee shall be for an amount which the Secretary determines to be sufficient, when added to the face value of the debentures issued and the cash adjustment paid to the mortgagee, to equal the amount which the mortgagee would have received if, at the time of the conveyance to the Secretary of the property covered by the mortgage, the mortgagor had redeemed the property and paid in full all obligations under the mortgage and a reasonable amount for necessary expenses incurred by the mortgagee in connection with the foreclosure proceedings, or the acquisition of the mortgaged property otherwise, and the conveyance thereof to the Secretary. Each such certificate of claim shall provide that there shall accrue to the holder of such certificate with respect to the face amount of such certificate, an increment at the rate of 3 per centum per annum which shall not be compounded. The amount to which the holder of any such certificate shall be entitled shall be determined as provided in subsection (f) of this section.

(2) A certificate of claim shall not be issued and the provisions of paragraph (1) of this subsection shall not be applicable in the case of a mortgage accepted for insurance pursuant to a commitment issued on or after September 2, 1964.

(f) Division of excess proceeds; settlement of certificates of claims and refunds to mortgagors

(1) If, after deducting (in such manner and amount as the Secretary shall determine to be equitable and in accordance with sound accounting practice) the expenses incurred by the Secretary, the net amount realized from any property conveyed to the Secretary under this section and the claims assigned therewith exceed the face value of the debentures issued and the cash paid in exchange for such property plus all interest paid on such debentures, such excess shall be divided as follows:

(i) If such excess is greater than the total amount payable under the certificate of claim issued in connection with such property, the Secretary shall pay to the holder of such certificate the full amount so payable, and any excess remaining thereafter shall be paid to the mortgagor of such property if the mortgage was insured under section 1709 of this title: Provided, That on and after September 2, 1964, any excess remaining after payment to the holder of the full amount of the certificate of claim, together with the accrued interest increment thereon, shall be retained by the Secretary and credited to the applicable insurance fund; and

(ii) If such excess is equal to or less than the total amount payable under such certificate of claim, the Secretary shall pay to the holder of such certificate the full amount of such excess.

(2) Notwithstanding any other provisions of this section, the Secretary is authorized, with respect to mortgages insured pursuant to commitments for insurance issued after August 11, 1955, and, with the consent of the mortgagee or mortgagor, as the case may be, with respect to mortgages insured pursuant to commitments issued prior to such date, to effect the settlement of certificates of claim and refunds to mortgagors at any time after the sale or transfer of title to the property conveyed to the Secretary under this section and without awaiting the final liquidation of such property for the

purpose of determining the net amount to be realized therefrom: Provided, That the settlement authority created by the Housing Amendments of 1955 shall be terminated with respect to any certificates of claim outstanding as of September 2, 1964.

(3) With the consent of the holder thereof, the Secretary is authorized, without awaiting the final liquidation of the Secretary's interest in the property, to settle any certificate of claim issued pursuant to subsection (e) of this section, with respect to which settlement had not been effected prior to September 2, 1964, by making payment in cash to the holder thereof of such amount not exceeding the face amount of the certificate of claim, together with the accrued interest thereon, as the Secretary may consider appropriate: Provided, That in any case where the certificate of claim is settled in accordance with the provisions of this paragraph, any amounts realized after September 2, 1964, in the liquidation of the Secretary's interest in the property, shall be retained by the Secretary and credited to the applicable insurance fund.

(g) Handling and disposal of property; settlement of claims

Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, the Secretary shall have power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any properties conveyed to him in exchange for debentures and certificates of claim as provided in this section; and notwithstanding any other provision of law, the Secretary shall also have power to pursue to final collection, by way of compromise or otherwise, all claims against mortgagors assigned by mortgagees to the Secretary as provided in this section: Provided, That section 5 of Title 41 shall not be construed to apply to any contract for hazard insurance, or to any purchase or contract for services or supplies on account of such property if the amount thereof does not exceed $1,000. The Secretary shall, by regulation, carry out a program of sales of such properties and shall

develop and implement appropriate credit terms and standards to be used in carrying out the program. The power to convey and to execute in the name of the Secretary deeds of conveyance, deeds of release, assignments and satisfactions of mortgages, and any other written instrument relating to real or personal property or any interest therein heretofore or hereafter acquired by the Secretary pursuant to the provisions of this chapter, may be exercised by an officer appointed by him, without the execution of any express delegation of power or power of attorney: Provided, That nothing in this subsection shall be construed to prevent the Secretary from delegating such power by order or by power of attorney, in his discretion, to any officer, agent, or employee he may appoint: And provided further, That a conveyance or transfer of title to real or personal property or an interest therein to the Secretary of Housing and Urban Development, his successors and assigns, without identifying the Secretary therein, shall be deemed a proper conveyance or transfer to the same extent and of like effect as if the Secretary were personally named in such conveyance or transfer. The Secretary may sell real and personal property acquired by the Secretary pursuant to the provisions of this chapter on such terms and conditions as the Secretary may prescribe.

(h) Disposition of assets in revitalization areas

(1) In general

The purpose of this subsection is to require the Secretary to carry out a program under which eligible assets (as such term is defined in paragraph (2)) shall be made available for sale in a manner that promotes the revitalization, through expanded homeownership opportunities, of revitalization areas. Notwithstanding the authority under the last sentence of subsection (g), the Secretary shall dispose of all eligible assets under the program and shall establish the program in accordance with the requirements under this subsection.

(2) Eligible assets

For purposes of this subsection, the term "eligible asset" means any of the following assets of the Secretary:

(A) Properties

Any property that--

(i) is designed as a dwelling for occupancy by 1 to 4 families;

(ii) is located in a revitalization area;

(iii) was previously subject to a mortgage insured under the provisions of this chapter [12 U.S.C.A. § 1201 et seq.]; and

(iv) is owned by the Secretary pursuant to the payment of insurance benefits under this chapter.

(B) Mortgages

Any mortgage that--

(i) is an interest in a property that meets the requirements of clauses (i) and (ii) of subparagraph (A);

(ii) was previously insured under the provisions of this chapter [12 U.S.C.A. § 1701 et seq.]; and

(iii) is held by the Secretary pursuant to the payment of insurance benefits under this chapter.

For purposes of this subsection, an asset under this subparagraph shall be considered to be located in a revitalization area, or in the asset control area of a preferred purchaser, if the property described in clause (i) is located in such area.

(C) Future interests

Any contingent future interest of the Secretary in an asset described in subparagraph (A) or (B).

(3) Revitalization areas

The Secretary shall designate areas as revitalization areas for purposes of this subsection. Before designation of an area as a revitalization area, the Secretary shall consult with affected units of general local government and interested nonprofit organizations. The Secretary may designate as revitalization areas only areas that meet one of the following requirements:

(A) Very-low income area

The median household income for the area is less than 60 percent of the median household income for--

(I) in the case of any area located within a metropolitan area, such metropolitan area; or

(II) in the case of any area not located within a metropolitan area, the State in which the area is located.

(B) High concentration of eligible assets

A high rate of default or foreclosure for single family mortgages insured under the National Housing Act has resulted, or may result, in the area--

(i) having a disproportionately high concentration of eligible assets, in comparison with the concentration of such assets in surrounding areas; or

(ii) being detrimentally impacted by eligible assets in the vicinity of the area.

(C) Low home ownership rate

The rate for home ownership of single family homes in the area is substantially below the rate for homeownership in the metropolitan area.

(4) Preference for sale to preferred purchasers

The Secretary shall provide a preference, among prospective purchasers of eligible assets, for sale of such assets to any purchaser who--

(A) is--

(i) the unit of general local government having jurisdiction with respect to the area in which are located the eligible assets to be sold; or

(ii) a nonprofit organization;

(B) in making a purchase under the program under this subsection--

(i) establishes an asset control area, which shall be an area that consists of part or all of a revitalization area; and

(ii) purchases all interests of the Secretary in all assets of the Secretary that, at any time during the period which

shall be set forth in the sale agreement required under paragraph (7)--

(I) are or become eligible assets; and

(II) are located in the asset control area of the purchaser; and

(C) has the capacity to carry out the purchase of eligible assets under the program under this subsection and under the provisions of this paragraph.

(5) Agreements required for purchase

(A) Preferred purchasers

Under the program under this subsection, the Secretary may sell an eligibleasset as provided in paragraph (4) to a preferred purchaser only pursuant to a binding agreement by the preferred purchaser that the eligible asset will be used in conjunction with a home ownership plan that provides as follows:

(i) The plan has as its primary purpose the expansion of home ownership in, and the revitalization of, the asset control area, established pursuant to paragraph (4)(B)(i) by the purchaser, in which the eligible asset is located.

(ii) Under the plan, the preferred purchaser has established, and agreed to meet, specific performance goals for increasing the rate of home ownership for eligible assets in the asset control area that are under the purchaser's control. The plan shall provide that the Secretary may waive or modify such goals or deadlines only upon a determination by the Secretary that a good faith effort has been made in complying with the goals through the homeownership plan and that exceptional neighborhood conditions prevented attainment of the goal.

(iii) Under the plan, the preferred purchaser has established rehabilitation standards that meet or exceed the standards for housing quality established under subparagraph (B)(iii) by the Secretary, and has agreed that each asset property for an eligible asset purchased will be rehabilitated in accordance with such standards.

(B) Non-preferred purchasers

Under the program under this subsection, the Secretary may sell an eligible asset to a purchaser who is not a preferred purchaser only pursuant to a binding agreement by the purchaser that complies with the following requirements:

(i) The purchaser has agreed to meet specific performance goals established by the Secretary for home ownership of the asset properties for the eligible assets purchased by the purchaser, except that the Secretary may, by including a provision in the sale agreement required under paragraph (7), provide for a lower rate of home ownership in sales involving exceptional circumstances.

(ii) The purchaser has agreed that each asset property for an eligible asset purchased will be rehabilitated to comply with minimum standards for housing quality established by the Secretary for purposes of the program under this subsection.

(6) Discount for preferred purchasers

(A) In general

For the purpose of providing a public purpose discount for the bulk sales of eligible assets made under the program under this subsection by preferred purchasers, each eligible asset sold through the program under this subsection to a preferred purchaser shall be sold at a price that is discounted from the value of the asset, as based on the appraised value of the asset property (as such term is defined in paragraph (8)).

(B) Appraisals

The Secretary shall require that each appraisal of an eligible asset under this paragraph is based upon--

(i) the market value of the asset property in its "as is" physical condition, which shall take into consideration age and condition of major mechanical and structural systems; and

(ii) the value of the property appraised for home ownership.

(C) Discount classes

The Secretary, in the sole discretion of the Secretary, shall establish the discount under this paragraph for an eligible asset, which shall be in one of the following amounts:

(i) Standard discount

In the case only of eligible assets with asset properties that, at the time of sale under this subsection, do not meet the standards for housing quality established pursuant to paragraph (5)(B)(ii), an amount that--

(I) is appropriate to provide reasonableresources for the improvement [FN2] such assets; and

(II) takes into consideration the financial safety and soundness of the Mutual Mortgage Insurance Fund.

(ii) Deep discount

In the case only of eligible assets described in clause (i) for which the Secretary determines a deep discount is appropriate, an amount that exceeds the amount of a standard discount under clause (i). In making a determination whether a deep discount is appropriate, the Secretary may consider the condition of the asset property, the extent of resources available to the preferred purchaser, the comprehensive revitalization plan undertaken by such purchaser, or any other circumstances the Secretary considers appropriate.

(iii) Minimal discount

In the case only of eligible assets with asset properties that, at the time of sale under this subsection, meet or substantially meet the standards for housing quality established pursuant to paragraph (5)(B)(ii), an amount that is less than the amount of a standard discount under clause (i) of this subparagraph and is sufficient to provide assistance to the preferred purchaser in meeting costs associated with compliance with the program requirements under this subsection.

(D) Determination of discount class

The Secretary shall, in the sole discretion of the Secretary, establish a method for determining which discount under clause (i) or (ii) subparagraph (C) shall be provided for

an eligible asset that is described in such clause (i) and sold to a preferred purchaser. The method may result in the assignment of discounts on any basis consistent with subparagraph (C) that the Secretary considers appropriate to carry out the purposes of this subsection.

(7) Sale agreement

The Secretary may sell an eligible asset under this subsection only pursuant to a sale agreement entered into under this paragraph with the purchaser, which shall include the following provisions:

(A) Assets

The sale agreement shall identify the eligible assets to be purchased and the interests sold.

(B) Revitalization area and asset control area

The sale agreement shall identify--

(i) the boundaries of the specific revitalization areas (or portions thereof) in which are located the eligible assets that are covered by the agreement; and

(ii) in the case of a preferred purchaser, the asset control area established pursuant to paragraph (4)(B)(i) that is covered by the agreement.

(C) Financing

The sale agreement shall identify the sources of financing for the purchase of the eligible assets.

(D) Binding agreements

The sale agreement shall contain binding agreements by the purchaser sufficient to comply with--

(i) in the case of a preferred purchaser, the requirements under paragraph (5)(A), which agreements shall provide that the eligible assets purchased will be used in conjunction with a home ownership plan meeting the requirements of such paragraph, and shall set forth the terms of the homeownership plan, including--

(I) the goals of the plan for the eligible assets purchased and for the asset control area subject to the plan;

(II) the revitalization areas (or portions thereof) in which the homeownership plan is operating or will operate;

(III) the specific use or disposition of the eligible assets under the plan; and

(IV) any activities to be conducted and services to be provided under the plan; or

(ii) in the case of a purchaser who is not a preferred purchaser, the requirements under paragraph (5)(B).

(E) Purchase price and discount

The sale agreement shall establish the purchase price of the eligible assets, which in the case of a preferred purchaser shall provide for a discount in accordance with paragraph (6).

(F) Housing quality

The sale agreement shall provide for compliance of the eligible assets purchased with the rehabilitation standards established under paragraph (5)(A)(iii) or the minimum standards for housing quality established under paragraph (5)(B)(ii), as applicable, and shall specify such standards.

(G) Performance goals and sanctions

The sale agreement shall set forth the specific performance goals applicable to the purchaser, in accordance with paragraph (5), shall set forth any sanctions for failure to meet such goals and deadlines, and shall require the purchaser to certify compliance with such goals.

(H) Period covered

The sale agreement shall establish--

(i) in the case of a preferred purchaser, the time period referred to in paragraph (4)(B)(ii); and

(ii) in the case of a purchaser who is not a preferred purchaser, the time period for purchase of eligible assets that may be covered by the purchase.

(I) Other terms

The agreement shall contain such other terms and conditions as may be necessary to require that eligible assets purchased under the agreement are used in accordance with the program under this subsection.

(8) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Asset control area

The term "asset control area" means the area established by a preferred purchaser pursuant to paragraph (4)(B)(i).

(B) Asset property

The term "asset property" means--

(i) with respect to an eligible asset that is a property, such property; and

(ii) with respect to an eligible asset that is a mortgage, the property that is subject to the mortgage.

(C) Eligible asset

The term "eligible asset" means an asset described in paragraph (2).

(D) Nonprofit organization

The term "nonprofit organization" means a private organization that--

(i) is organized under State or local laws;

(ii) has no part of its net earnings inuring to the benefit of any member, shareholder, founder, contributor, or individual; and

(iii) complies with standards of financial responsibility that the Secretary may require.

(E) Preferred purchaser

The term "preferred purchaser" means a purchaser described in paragraph (4).

(F) Unit of general local government

The term "unit of general local government" means any city, town, township, county, parish, village, or other general purpose political subdivision of a State.

(9) Secretary's discretion

The Secretary shall have the authority to implement and administer the program under this subsection in such manner as the Secretary may determine. The Secretary may, in the sole discretion of the Secretary, enter into contracts to provide

for the proper administration of the program with such public or nonprofit entities as the Secretary determines are qualified.

(10) Regulations

The Secretary shall issue regulations to implement the program under this subsection through rulemaking in accordance with the procedures established under section 553 of title 5, United States Code [5 U.S.C.A. § 553], regarding substantive rules. Such regulations shall take effect not later than the expiration of the 2-year period beginning on the date of the enactment of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 [October 21, 1998].

(i) Mortgagor's or mortgagee's interest in property or claim conveyed

No mortgagee or mortgagor shall have, and no certificate of claim shall be construed to give to any mortgagee or mortgagor, any right or interest in any property conveyed to the Secretary or in any claim assigned to him; nor shall the Secretary owe any duty to any mortgagee or mortgagor with respect to the handling or disposal of any such property or the collection of any such claim.

(j) Foreclosure; payment and cessation of obligation

In the event that any mortgagee under a mortgage insured under section 1709 of this title (other than a mortgagee receiving insurance benefits under clause (1)(A) of the second sentence of subsection (a) of this section) forecloses on the mortgaged property but does not convey such property to the Secretary in accordance with this section, and the Secretary is given written notice thereof, or in the event that the mortgagor pays the obligation under the mortgage in full prior to the maturity thereof, and the mortgagee pays any adjusted premium charge required under the provisions of section 1709(c) of this title, and the Secretary is given written notice by the mortgagee of the payment of such obligation, the obligation to pay any subsequent premium charge for insurance shall cease, and all rights of the mortgagee and the

mortgagor under this section shall terminate as of the date of such notice.

(k) Repealed. Pub.L. 105-276, Title VI, § 601(c), Oct. 21, 1998, 112 Stat. 2673

(l ) Nullification of right of redemption of single family mortgagors

(1) Whenever the Secretary or a contract mortgagee (pursuant to its contract with the Secretary) forecloses on a Secretary-held single family mortgage in any Federal or State court or pursuant to a power of sale in a mortgage, the purchaser at the foreclosure sale shall be entitled to receive a conveyance of title to, and possession of, the property, subject to the interests senior to the interests of the Secretary or the contract mortgagee, as the case may be. Notwithstanding any State law to the contrary, there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale in connection with a Secretary-held single family mortgage. The appropriate State official or the trustee, as the case may be, shall execute and deliver a deed or other appropriate instrument conveying title to the purchaser at the foreclosure sale, consistent with applicable procedures in the jurisdiction and without regard to any such right of redemption.

(2) The following actions shall be taken in order to verify title in the purchaser at the foreclosure sale:

(A) In the case of a judicial foreclosure in any Federal or State court, there shall be included in the petition and in the judgment of foreclosure a statement that the foreclosure is in accordance with this subsection and that there is no right of redemption in the mortgagor or any other person.

(B) In the case of a foreclosure pursuant to a power of sale provision in the mortgage, the statement required in subparagraph (A) shall be included in the advertisement of the sale and either in the recitals of the deed or other

appropriate instrument conveying title to the purchaser at the foreclosure sale or in an affidavit or addendum to the deed.

(3) For purposes of this subsection:

(A) The term "contract mortgagee" means a person or entity under a contract with the Secretary that provides for the assignment of a single-family mortgage from the Secretary to the person or entity for the purpose of pursuing foreclosure.

(B) the [FN3] term "mortgage" means a deed of trust, mortgage, deed to secure debt, security agreement, or any other form of instrument under which any interest in property, real, personal, or mixed, or any interest in property, including leaseholds, life estates, reversionary interests, and any other estates under applicable State law, is conveyed in trust, mortgaged, encumbered, pledged, or otherwise rendered subject to a lien, for the purpose of securing the payment of money or the performance of an obligation.

(C) The term "Secretary-held single family mortgage" means a single-family mortgage held by the Secretary or by a contract mortgagee at the time of initiation of foreclosure that--

(i) was formerly insured by the Secretary under any section of this subchapter; or

(ii) was taken by the Secretary as a purchase money mortgage in connection with the sale or other transfer of Secretary-owned property under any section of this subchapter.

(D) The term "single-family mortgage" means a mortgage that covers property on which is located a 1-to-4 family residence.

[FN1] So in original. Probably should be "mortgagee".
[FN2] So in original. Probably should be followed by "of".
[FN3] So in original. Probably should be "The".

**42 U.S.C. § 1441. Congressional declaration of national housing policy**

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution toward an economy of maximum employment, production, and purchasing power. The policy to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment, and to provide adequate housing for urban and rural nonfarm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through

reliance solely upon private enterprise, and without such aid; and (5) governmental assistance for decent, safe, and sanitary farm dwellings and related facilities shall be extended where the farm owner demonstrates that he lacks sufficient resources to provide such housing on his own account and is unable to secure necessary credit for such housing from other sources on terms and conditions which he could reasonably be expected to fulfill. The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the costs of housing without sacrifice of such sound standards; (3) the use of new designs, materials, techniques, and methods in residential construction, the use of standardized dimensions and methods of assembly of home-building materials and equipment, and the increase of efficiency in residential construction and maintenance; (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities; and (5) the stabilization of the housing industry at a high annual volume of residential construction.

**42 U.S.C. § 1441a. National housing goals**

(a) Congressional findings and reaffirmation of goals

The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949 [42 U.S.C.A. § 1441 et seq.], of the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family". The Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families.

(b) Additional Congressional findings

The Congress further finds that policies designed to contribute to the achievement of the national housing goal have not directed sufficient attention and resources to the preservation of existing housing and neighborhoods, that the deterioration and abandonment of housing for the Nation's lower income families has accelerated over the last decade, and that this acceleration has contributed to neighborhood disintegration and has partially negated the progress toward achieving the national housing goal which has been made primarily through new housing construction.

(c) Congressional declaration of purposes

The Congress declares that if the national housing goal is to be achieved, a greater effort must be made to encourage the preservation of existing housing and neighborhoods through such measures as housing preservation, moderate rehabilitation, and improvements in housing management and maintenance, in conjunction with the provision of adequate municipal services. Such an effort should concentrate, to a greater extent than it has in the past, on housing and neighborhoods where deterioration is evident but has not yet become acute.

**24 C.F.R. § 291.100 General policy.**

For all sales, except as otherwise specifically indicated, those sales conducted in accordance with §§ 291.90(a) and 291.200 or with subpart D of this part, the following general policies apply:

(a) Qualified purchaser.

(1) Anyone, including a purchaser from a transferor of a property pursuant to §§ 291.90(a) and 291.200, regardless of race, color, religion, sex, national origin, familial status, age, or disability may offer to buy a HUD-owned property, except that:

(i) No member of or delegate to Congress is eligible to buy or benefit from a purchase of a HUD-owned property; and

(ii) No nonoccupant mortgagor (whether an original mortgagor, assumptor, or a person who purchased "subject to") of an insured mortgage who has defaulted, thereby causing HUD to pay an insurance claim on the mortgage, is eligible to repurchase the same property.

(2) Neither HUD nor any transferor pursuant to §§ 291.90(a) or 291.200 will offer former mortgagors in occupancy who have defaulted on the mortgage the right of first refusal to repurchase the same property.

(3) HUD will offer tenants accepted under the occupied conveyance procedures outlined in 24 CFR 203.670 through 203.685 the right of first refusal to purchase the property only if:

(i) The tenant has a recognized ability to acquire financing and a good rent- paying history, and has made a request to HUD to be offered the right of first refusal; or

(ii) State or local law requires that tenants be offered the right of first refusal.

(b) List price. The list price, or "asking price," assigned to the property is based upon an appraisal conducted by an independent real estate appraiser using nationally recognized industry standards for the appraisal of residential property.

(c) Insurance. Properties may be sold under the following programs:

(1) Insured. A property that meets the Minimum Property Standards (MPS), as determined by the Secretary, for existing dwellings (Requirements for Existing Housing, One to Four Family Living Units, HUD Handbook 4905.1, which is available at the Department of Housing and Urban Development, HUD Customer Service Center, 451 7th Street, SW, Room B-100, Washington, DC 20410; by calling (202) 708-3151; or via the Internet at www.hud.gov) will be offered for sale in "as-is" condition with FHA mortgage insurance available. Flood insurance must be obtained and maintained as provided in 24 CFR 203.16a.

(2) Insured with repair escrow. A property that requires no more than $5,000 for repairs to meet the MPS, as determined by the Secretary, will be offered for sale in "as-is" condition with FHA mortgage insurance available, provided the mortgagor establishes a cash escrow to ensure the completion of the required repairs.

(3) Uninsured. A property that fails to qualify under either paragraph (c)(1) or (c)(2) of this section will be offered for sale either in "as-is" condition without mortgage insurance available, or in "as-is" condition under section 203(k) of the National Housing Act (12 U.S.C. 1709(k)).

(d) Financing.

(1) Except as provided in paragraph (d)(2) of this section, the purchaser is entirely responsible for obtaining financing for purchasing a property.

(2) HUD, in its sole discretion, may take back purchase money mortgages (PMMs) on property purchased by governmental entities or private nonprofit organizations who buy property for ultimate resale to owner-occupant purchasers with incomes at or below 115 percent of the area median income. When offered by HUD, a PMM will be available in an amount determined by the Secretary to be appropriate, at

market rate interest, for a period not to exceed 5 years. Mortgagors must meet FHA mortgage credit standards.

(3) Purchase money mortgage (PMM). For purposes of this section, the term "purchase money mortgage," or PMM means a note secured by a mortgage or trust deed given by a buyer, as mortgagor, to the seller, as mortgagee, as part of the purchase price of the real estate.

(e) Environmental requirements and standards. Sales under this part are subject to the environmental requirements and standards described in 24 CFR part 50, as applicable.

(f) [Reserved]

(g) Lead-based paint poisoning prevention. Properties constructed before 1978 are subject to the requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851-4856), and implementing regulations at part 35, subparts A, B, F, and R, of this title.

(h) Listings. Any real estate broker who has agreed to comply with HUD requirements may participate in the sales program. Purchasers participating in the competitive sales program, except government entities and nonprofit organizations, must submit bids through a participating broker.

(1) Open listings. Except as provided in paragraph (h)(2) of this section, properties are sold on an open listing basis with participating real estate brokers.

(2) Asset management and listing contracts.

(i) A local HUD office may invite firms experienced in property management to compete for contracts that provide for an exclusive right to manage and list specified properties in a given area.

(ii) In areas where a broker has an exclusive right to list properties, a purchaser may use a broker of his or her choice. The purchaser's broker must submit the bid to HUD through the exclusive broker.

**Executive Order 12,612, 50 Fed. Reg. 14,000**

**Executive Order 12612 of October 26, 1987**

**Federalism**

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

**Section 1.** *Definitions.* For purposes of this Order:
(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.
(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

**Sec. 2.** *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:
(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.
(b) The people of the States created the national government when they delegated to it those enumerated governmental

powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate

authority of the national government should be resolved against regulation at the national level.

**Sec. 3.** *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional Authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

**Sec. 4.** *Special Requirements for Preemption.* (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the

department or agency the authority to Issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

**Sec. 5.** *Special Requirements for Legislative Proposals.* Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

**Sec. 6.** *Agency Implementation.* (a) The head of each Executive department and agency shall designate an official

to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

**Sec. 7.** *Government-wide Federalism Coordination and Review.* (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments

and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

**Sec. 8.** *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

THE WHITE HOUSE,
*October 26, 1987.*

## HUD HANDBOOK

**Property Disposition Handbo[illegible] One to Four Family, Section 4310.5, Chapter 6, Part 6-19**

Programming Priorities.

Properties are to be sold on an "as-is" basis, without repairs or warranties. The principal method of sale is the competitive sales procedure. Using the following programs, plan disposition in the order of priorities shown below.

A. Insured. A property that HUD believes, in its present condition, meets the intent of the Minimum Property Standards (MPS) described in Handbook 4905.1, Requirements for Existing Housing, One to Four Living Units. "Intent" is defined as: Based upon a visual inspection the property is structurally sound, free of roof leaks, and has operable mechanical systems. Properties meeting the intent of MPS shall be offered in their as-is condition with mortgage insurance available. The insured program is described at paragraph 10-7.

B. Insured with Repair Escrow. Properties which need less than $5,000 worth of repairs to meet the intent of the MPS, will be offered for sale with mortgage insurance available, provided a cash escrow is established to ensure the completion of repairs. The insured with repair program is described at paragraph 10-8.

C. Section 203(k) Financing. The 203(k) program may be used in connection with as-is, uninsured listings. The program allows a buyer to obtain one mortgage loan to finance acquisition and repair, provided the amount of repairs required makes financing feasible. The Section 203(k) program is described at paragraph 10-9.

D. Uninsured. Properties which in their present condition fail to qualify for the foregoing types of financing are to be made available for sale without mortgage insurance. The uninsured program is described at paragraph 10-10.

**Property Disposition Handbook - One to Four Family, Section 4310.5, Chapter 1, Part 1-5 (B 4).**

Field Offices are responsible for ongoing management, marketing, sales, and closing of acquired properties under their jurisdiction. The overall director of Property Disposition (PD) at the local level is the Field Office Manager, under the general direction of the Regional Administrator. Field Offices are required to use the procedures in this handbook and are encouraged to develop and recommend for Headquarters' approval new or experimental programs as needed.

**Multifamily Property Disposition - Management, Section 4315.1, Chapter 10, Part 10-1 (C).**

Local housing codes apply to MIP projects but not to HUD-owned projects; however, for HUD-owned projects, repair and construction specifications should be developed as if the housing codes applied.

**Multifamily Property Disposition - Management, Section 4315.1, Chapter 1, Part 1-2 Definitions (Z).**

MIP. Mortgagee-in-Possession.

HUD, as mortgagee, may take possession of a multifamily project as part of initiating foreclosure to protect the health and safety of the residents and to preserve the asset.

**Minnesota Statutes Section 16B.62**

Subdivision 1. Municipal enforcement.

The state building code applies statewide and supersedes the building code of any municipality. The state building code does not apply to agricultural buildings except with respect to state inspections required or rulemaking authorized by sections 103F.141, 216C.19, subdivision 8, and 326.244. All municipalities shall adopt and enforce the state building code with respect to new construction within their respective jurisdictions.

If a city has adopted or is enforcing the state building code on June 3, 1977, or determines by ordinance after that date to undertake enforcement, it shall enforce the code within the city. A city may by ordinance extend the enforcement of the code to contiguous unincorporated territory not more than two miles distant from its corporate limits in any direction. Where two or more noncontiguous cities which have elected to enforce the code have boundaries less than four miles apart, each is authorized to enforce the code on its side of a line equidistant between them. Once enforcement authority is extended extraterritorially by ordinance, the authority may continue to be exercised in the designated territory even though another city less than four miles distant later elects to enforce the code. After the extension, the city may enforce the code in the designated area to the same extent as if the property were situated within its corporate limits.

A city which, on June 3, 1977, had not adopted the code may not commence enforcement of the code within or outside of its jurisdiction until it has provided written notice to the commissioner, the county auditor, and the town clerk of each town in which it intends to enforce the code. A public hearing on the proposed enforcement must be held not less than 30 days after the notice has been provided. Enforcement of the code by the city outside of its jurisdiction commences

on the first day of January in the year following the notice and hearing.

Municipalities may provide for the issuance of permits, inspection, and enforcement within their jurisdictions by means which are convenient, and lawful, including by means of contracts with other municipalities pursuant to section 471.59, and with qualified individuals. The other municipalities or qualified individuals may be reimbursed by retention or remission of some or all of the building permit fee collected or by other means. In areas of the state where inspection and enforcement is unavailable from qualified employees of municipalities, the commissioner shall train and designate individuals available to carry out inspection and enforcement on a fee basis.

Subd. 2. Enforcement by state building official.

If the commissioner determines that a municipality is not properly administering and enforcing the State Building Code as provided in section 16B.71, the commissioner may have the administration and enforcement in the involved municipality undertaken by the state building official. The commissioner shall notify the affected municipality in writing immediately upon making the determination, and the municipality may challenge the determination as a contested case before the commissioner pursuant to the Administrative Procedure Act. In municipalities not properly administering and enforcing the State Building Code, and in municipalities who determine not to administer and enforce the State Building Code, the commissioner shall have administration and enforcement undertaken by the state building official or by another inspector certified by the state. In carrying out administration and enforcement under this subdivision, the commissioner shall apply any optional provision of the State Building Code adopted by the municipality. A municipality adopting any optional code provision shall notify the state building official within 30 days of its adoption. The

commissioner shall determine appropriate fees to be charged for the administration and enforcement service rendered. Any cost to the state arising from the state administration and enforcement of the State Building Code shall be borne by the subject municipality.

**Minnesota Statutes Section 299F.011**

Subdivision 1. Authority.

The commissioner of public safety through the division of fire marshal may promulgate a Uniform Fire Code and make amendments thereto in accordance with the Administrative Procedure Act in chapter 14. The code and its amendments shall conform insofar as practicable to model fire codes generally accepted and in use throughout the United States, with consideration given to existing statewide specialty codes presently in use in the state of Minnesota. Statewide specialty codes and model codes with necessary modifications may be adopted by reference in accordance with section 14.07, subdivision 4.

Subd. 2. Repealed by Laws 1981, c. 106, § 16.

Subd. 3. Rules for code administration and enforcement.

The commissioner shall adopt rules as may be necessary to administer and enforce the code, specifically including but not limited to rules for inspection of buildings and other structures covered by the code and conforming the code to the governmental organization of Minnesota state agencies, political subdivisions and local governments.

Subd. 4. Applicability; local authority.

The Uniform Fire Code shall be applicable throughout the state and in all political subdivisions and municipalities therein. However, nothing in this subdivision shall prohibit a local unit of government otherwise authorized by law from adopting or enforcing any ordinance or regulation which specifies requirements equal to, in addition to, or more stringent than the requirements of the Uniform Fire Code. Any ordinance or regulation adopted by a local unit which differs from the Uniform Fire Code must be directly related to the safeguarding of life and property from the hazards of fire,

must be uniform for each class or kind of building covered, and may not exceed the applicable requirements of the Uniform Building Code adopted pursuant to sections 16B.59 to 16B.73.

Subd. 4a. Day care home regulation.

(a) Notwithstanding any contrary provision of this section, the fire marshal shall not adopt or enforce a rule:

(1) establishing staff ratios, age distribution requirements, and limitations on the number of children in care;

(2) regulating the means of egress from family or group family day care homes in addition to the egress rules that apply to the home as a single family dwelling; or

(3) confining family or group family day care home activities to the floor of exit discharge.

(b) For purposes of this subdivision, "family or group family day care home" means a dwelling unit in which the day care provider provides the services referred to in section 245A.02, subdivision 10, to one or more persons.

(c) Nothing in this subdivision prohibits the department of human services from adopting or enforcing rules regulating day care, including the subjects in paragraph (a), clauses (1) and (3). The department may not, however, adopt or enforce a rule stricter than paragraph (a), clause (2).

(d) The department of human services may by rule adopt procedures for requesting the state fire marshal or a local fire marshal to conduct an inspection of day care homes to ensure compliance with state or local fire codes.

(e) The commissioners of public safety and human services may enter into an agreement for the commissioner of human services to perform follow-up inspections of programs, subject to licensure under section 245A, to determine whether certain violations cited by the state fire marshal have been corrected. The agreement shall identify specific items the commissioner of human services is permitted to inspect. The list of items is not subject to rulemaking and may be changed by mutual agreement between the state fire marshal and the

commissioner. The agreement shall provide for training of individuals who will conduct follow-up inspections. The agreement shall contain procedures for the commissioner of human services to follow when the commissioner requires assistance from the state fire marshal to carry out the duties of the agreement.

(f) No tort liability is transferred to the commissioner of human services as a result of the commissioner of human services performing activities within the limits of the agreement.

Subd. 4b. Stairway.

The Uniform Fire Code shall not require stairways of existing multiple dwelling buildings of two stories or less to be enclosed. For the purposes of this subdivision the term "stories" has the meaning given it in the State Building Code.

Subd. 4c. Exit sign illumination.

For a new building on which construction is begun on or after October 1, 1993, or an existing building on which remodeling affecting 50 percent or more of the enclosed space is begun on or after October 1, 1993, the Uniform Fire Code must prohibit the use of internally illuminated exit signs whose electrical consumption during nonemergency operation exceeds 20 watts of resistive power. All other requirements in the code for exit signs must be complied with.

Subd. 5. Appeal policy; variance.

Upon application, the state fire marshal may grant variances from the minimum requirements specified in the code if there is substantial compliance with the provisions of the code, the safety of the public and occupants of such building will not be jeopardized, and undue hardship will result to the applicant unless such variance is granted. No appeal to the state fire marshal for a variance from the Uniform Fire Code shall be accepted until the applicant has first made application to the

local governing body and the local unit has acted on the application. The state fire marshal shall consider the decision of the local governing body. Any person aggrieved by a decision made by the fire marshal under this subdivision may proceed before the fire marshal as with a contested case in accordance with the Administrative Procedure Act.

Subd. 5a. Local board of appeal.

Local governing bodies may appoint boards of appeal to hear and rule on appeals from orders issued under the fire code. An appeal from a local board of appeal may be made to the local governing body. If a board of appeal is not appointed, the appeals of orders must be made directly to the governing body. Local boards of appeal and governing bodies are not liable for damages in connection with granting variances, abatements, denials, or modifications of orders from the fire code that are made in good faith.

Subd. 5b. Variance considerations.

When considering appeals for variances from the fire code, the local appeal board or governing body, the state fire marshal, a state administrative law judge, and a court shall take into consideration the benefit to be obtained by complying with the fire marshal's orders and the effect on affordable housing, provided that the spirit of the code is complied with and public safety secured.

Subd. 6. Misdemeanor.

A person who violates a provision of the Uniform Fire Code shall be guilty of a misdemeanor. No person shall be convicted for violating the Uniform Fire Code unless the person shall have been given notice of the violation in writing and reasonable time to comply. The notice must contain a statement explaining the right to appeal the orders.

**Minnesota Statutes Section 299F.057**

The provisions of sections 299F.052 to 299F.057 shall not be construed to affect or repeal any ordinance of any municipality relating to fire prevention or the control of arson, but the jurisdiction of the state fire marshal and the superintendent of the bureau of criminal apprehension in the municipality is to be concurrent with that of the municipal and county authorities.

**St. Paul Legislative Code Chapter 45. Nuisance Abatement**

**Sec. 45.01. Declaration of policy.**

The purpose of this chapter is to protect the public health, safety and welfare by enactment of provisions which:

(1) Define public nuisances and nuisance conditions.

(2) Determine the responsibilities of owners and operators of dwellings and property for correction of nuisance conditions.

(3) Provide remedies to eliminate public nuisances.

(4) Provide for administration, enforcement and penalties.

(5) Promote the stabilization and maintenance of neighborhoods.

**Sec. 45.02. Definitions.**

The following definitions shall apply to this chapter:

*Attractive nuisance:* A condition such as a dangerous structure, an unsecured vacant or condemned building, or other condition which in the opinion of the enforcement officer may attract nonowner(s) or other unauthorized person(s) and which would expose them to risk, peril or danger.

*Enforcement officer:* The director of the division of property code enforcement, the director of the department of fire and safety services, the director of the department of police, or their duly authorized representative.

*Extermination:* The control and/or the elimination of insects, rodents and other pests by integrated pest management which promotes sanitation, harborage control and other nonlethal control methods before the use of legal approved pesticides, trapping and other pest elimination methods.

*Hazardous waste:* Any waste material so defined by Minnesota Statutes 116.06, subdivision 13 or described or

listed as hazardous waste in Minnesota Rules Chapter 7045, known as Minnesota Pollution Control and Hazardous Waste Division Hazardous Waste Rules.

*Interested party:* Any owner of record, occupying tenant or lien holder of record.

*Last known address:* The address shown on the records of the Ramsey County Department of Property Taxation or a more recent address known to the enforcement officer. In the case of parties not listed in these records, the last known address shall be that address obtained by the officer after a reasonable search.

*Mail:* Service by mail shall mean by depositing the item with the United States Postal Service addressed to the intended recipient at his or her last known address with first class postage prepaid thereon.

*Noxious substances:* Substances, solid or fluid, gaseous or odorous, which are detrimental to health, hurtful or dangerous. Noxious substances shall include, but not be limited to, any dead animal or portion thereof, putrid carcass, decayed animal matter, green hides, or any putrid, spoiled, foul or stinking beef, pork, fish; offal, hides, skins, fat, grease, liquors, human or animal excrement or manure.

*Nuisance building:* A vacant building or portion of a vacant building as defined in section 43.02 which has multiple housing code or building code violations or has been ordered vacated by the city and which has conditions constituting material endangerment as defined in Saint Paul Legislative Code section 34.23(g), or which has a documented and confirmed history as a blighting influence on the community.

*Owner:* Those shown to be owner or owners on the records of the Ramsey County Department of Property Taxation.

*Personal service:* Service by personally handing a copy to the intended recipient or by leaving a copy at the intended

recipient's residence or place of business with a person of suitable age and discretion.

*Privy:* Any type of nonflush fixture for the receipt and storage of human waste including fixed units with vaults as well as portable units.

*Property:* Any parcel of land whether vacant or not, whether any structure thereon is occupied or not, or whether submerged or not.

*Refuse:* Putrescible and nonputrescrible and combustible and noncombustible waste, including paper, garbage, material resulting from the handling, processing, storage, preparation, serving and consumption of food, vegetable or animal matter, offal, rubbish, plant wastes such as tree trimmings or grass cuttings, ashes, incinerator residue, street cleanings, construction debris, detached vehicle parts, and solid industrial and market wastes.

*Responsible party:* Any one (1) or more of the following:

(1) Agent;

(2) Assignee or collector of rents;

(3) Holder of a contract for deed;

(4) A mortgagee or vendee in possession;

(5) Receiver or executor or trustee;

(6) Lessee;

(7) Those known to the enforcement officer as having an ownership interest; or

(8) Other person, firm or corporation exercising apparent control over a property.

*Weeds* shall mean and include not only such noxious weeds as are enumerated in Agriculture Rule 1505.0730 of the State of Minnesota Rules, but also such useless and troublesome plants as are commonly known as weeds to the general public that are over eight (8) inches in height.

**Sec. 45.03. Nuisance.**

A "nuisance" shall mean any substance, matter, emission or thing which creates a dangerous or unhealthy condition or which threatens the public peace, health, safety or sanitary condition of the city or which is offensive or has a blighting influence on the community and which is found upon, in, being discharged or flowing from any street, alley, highway, railroad right-of-way, vehicle, railroad car, water, excavation, building, erection, lot, grounds or other property located within the city. Nuisances shall include, but not be limited to, those set forth in this section.

(1) *Dangerous structure.* A structure which is potentially hazardous to persons or property including, but not limited to:

a. A structure which is in danger of partial or complete collapse; or

b. A structure with any exterior parts which are loose or in danger of falling; or

c. A structure with any parts such as floors, porches, railings, stairs, ramps, balconies or roofs which are accessible and which are either collapsed, in danger of collapsing, or unable to support the weight of normally imposed loads.

(2) *Dumped snow.* Accumulated snow and ice that is brought in from another location and dumped, kept or stored in such a condition that litter, gravel or melting snow/ice create a dangerous or unhealthy condition.

(3) *Fire hazards.* Any thing or condition on the property which, in the opinion of the enforcement officer, creates a fire hazard or which is a violation of the fire code.

(4) *Firewood.* Piles of wood cut for fuel which are detrimental to the health, safety and welfare of the public because of conditions including, but not limited to, improper or unsafe storage, unelevated piles of wood, excessive

quantities, conducive to vermin harborage, and more than five (5) feet in height or closer than ten (10) feet to a habitable building.

(5) *Graffiti.* Any initials, marks, symbols, designs, inscriptions or other drawings, scratched, painted, inscribed or otherwise affixed upon any structure without the permission of the owner.

(6) *Grass and weeds.* Grass which has grown upon any property to a height of eight (8) or more inches or weeds.

(7) *Hazards.* Any thing or condition on the property which, in the opinion of the enforcement officer, may contribute to injury of any person present on the property. Hazards, which shall include, but not be limited to, open holes, open foundations, open wells, dangerous trees or limbs, abandoned refrigerators or trapping devices.

(8) *Health hazards.* Any thing or condition on the property which, in the opinion of the enforcement officer, creates a health hazard or which is a violation of any health or sanitation law.

(9) *Insects, rodents and pest harborage.* Conditions which are conducive to the presence, harborage or breeding of insects, rodents or other pests. Bees or pigeons kept with written permission from and maintained in accordance with the regulations of the division of public health are exempt from the provisions of this chapter.

(10) *Nuisance building.* Any building or portion of a building which is a nuisance as defined in section 45.02.

(11) *Obstructions over public sidewalks.* Shrubs, bushes, trees, vines or other uncontrolled vegetation which has grown over the public sidewalk and which obstructs, interferes or renders dangerous for passage any public sidewalk.

(12) *Open sewer lines and connections.* Any broken sewer line or defective connection to an underground sewer system which is open, broken, disconnected or which has not been

properly sealed and which could allow the egress of rodents from the sewer.

(13) *Pests.* Pests shall include, but not be limited to, pigeons, grackles, starlings, snakes, bats, skunks, raccoons and squirrels.

(14) *Pest feeding.* The intentional feeding of pests where such feeding reasonably can be determined by the enforcement officer to cause or contribute to the harborage, breeding or pest infestation in that area or neighborhood. The enforcement officer may take into account the numbers of pests which are fed, the overall population of pests in the area, the danger and/or risk to the public health and welfare, and the increased difficulty of control of the pests in the area in making a determination. The term "pest," for the purpose of this subsection, shall include, but not be limited to, pigeons, squirrels, grackles and starlings.

(15) *Rank plant growth.* Overgrown, uncontrolled vegetation, shrubs, trees, vines that are conducive to the accumulation of refuse, debris or the harborage of vermin.

(16) *Refuse, noxious substances, hazardous wastes.* Refuse, noxious substances or hazardous wastes laying, pooled, accumulated, piled, left, deposited, buried or discharged upon, in, being discharged or flowing from any property, structure or vehicle, except for:

a. Refuse deposited at places designated and provided for that purpose by this Legislative Code;

b. Refuse stored in accordance with provisions of this Legislative Code or vehicle parts stored in an enclosed structure;

c. Compost piles established and maintained in accordance with the regulations of Chapter 357 of this Legislative Code;

d. Dead animals buried with written permission from, and in accordance with the regulations of, the division of public health; or

e. Green hides received, stored, dressed, packed or sold with written permission from, and in accordance with the conditions set by, the division of public health.

(17) *Sanitary structures.* Structures for sanitation such as privies, vaults, sewers, private drains, septic tanks, cesspools, drain fields which have failed or do not function properly or which are overflowing, leaking or emanating odors. Septic tanks, cesspools or cisterns which are abandoned or no longer in use unless they are emptied and filled with clean fill. Any vault, cesspool or septic tank which does not meet the following criteria:

a. The bottom and sides are cemented to make impervious to water;

b. The bottom is at least six (6) feet below grade;

c. Proper ventilating pipes and covers are provided;

d. It is properly located in accordance with applicable Minnesota State Statutes and city ordinances;

e. It is cleaned at least once a year; and

f. The property served is located such that connection to the public sewer is impractical.

(18) *Stagnant water.* Stagnant water standing on any property. Any property, container or material kept in such a condition that water can accumulate and stagnate.

(19) *Statute and common law nuisances.* Any thing or condition on property which is known to the common law of the land, the Statutes of Minnesota, or the Saint Paul Legislative Code as a nuisance.

(20) *Unsecured unoccupied buildings.* Unoccupied buildings or unoccupied portions of buildings which are unsecured.

(21) *Vehicles.* Overweight and commercial vehicles as regulated under "General Parking Restriction" section 157.04(a) and (b).

(22) *Vermin harborage.* Conditions which, in the opinion of the enforcement officer, are conducive to the harborage or breeding of vermin.

(23) *Vermin infestations.* Infestations of vermin such as rats, mice, squirrels, skunks, snakes, bats, grackles, starlings, pigeons, bees, wasps, cockroaches or flies; except for bees or pigeons kept with written permission from, and in accordance with the regulations of, the Office of License, Inspections and Environmental Protection.

**Sec. 45.04. Violations.**

No person shall, directly or indirectly or by omission, create a nuisance.

(a) No owner or responsible party shall allow a nuisance to remain upon or in any property or structure under his or her control.

(b) No owner of any truck, trailer, railroad car or flat, or other vehicle shall leave the vehicle standing on or along any street, highway, freeway or railroad track, or other property within the city, carrying or containing any refuse, noxious substance or hazardous waste, except as otherwise permitted by this Legislative Code.

**Sec. 45.05. Disclosure of responsible party.**

Upon the request of the enforcement officer, a responsible party or owner shall disclose the name of any other responsible party or owner known to him. This shall include, but not be limited to, the person for whom he/she is acting, from whom he/she is leasing the property, to whom he/she is

leasing the property, with whom he/she shares joint ownership, or with whom he/she has any contract pertaining to the real property.

**Sec. 45.06. Order to cease.**

In the event that an enforcement officer observes a person creating a nuisance, the officer may, after presenting proper identification, order that the person cease and desist creating a nuisance.

**Sec. 45.07. Enforcement officer authorized to enter.**

The enforcement officer shall be authorized to enter any property or structure in the city for the purpose of enforcing and assuring compliance with the provisions of this chapter. An owner or responsible party shall, upon the request of the enforcement officer, provide access to all interior portions of a building in order to permit the officer to make a complete inspection.

**Sec. 45.08. Authority to abate.**

(a) The city is authorized to abate nuisances in accordance with the procedures set forth in sections 45.10, 45.11 and 45.12. All abatement costs incurred shall be charged against the property as a special assessment to be collected in the manner provided for in the City Charter, Chapter 14. Except when a request is filed for a review of an emergency abatement, the assessment hearing shall be replaced by the hearing provided for in section 45.12.

(b) Abatement may include, but shall not be limited to, removal, cleaning, extermination, cutting, mowing, grading, sewer repairs, draining, securing, boarding unoccupied structures, barricading or fencing, removing dangerous portions of structures and demolition of dangerous structures or abandoned buildings.

(c) Abatement costs shall include specifically, but not exclusively, the cost of the abatement; the cost of investigation, including title searches, inspections and testing;

the cost of notification including service costs; filing costs; attorney fees, witness fees and appraisers' fees; and administrative costs.

**Sec. 45.09. Service.**

(a) When service of an order or notice is required, any one (1) or more of the following methods of service shall be adequate:

(1) By personal service; or

(2) By certified mail, through the U.S. Postal Service; or

(3) By U.S. mail, unless it is a written order which gives three (3) days or less for the completion of any act it requires; or

(4) If the appropriate party or address cannot be determined after reasonable effort, by posting a copy of the order in a conspicuous place on the property.

(b) If a mailed order or notice is returned by the United States Postal Service, a good faith effort shall be made to determine the correct address, unless the order or notice orders abatement and that abatement has been completed.

**Sec. 45.10. Abatement procedure.**

Unless the nuisance is as described in sections 45.11 or 45.12, the city may abate the nuisance by the procedure described below:

(1) *Order.* The enforcement officer shall serve a written order upon the owner. The written order shall also be served upon any responsible party known to the officer and may be served upon any party known to have caused the nuisance. The written order shall contain the following:

a. A description of the real estate sufficient for identification;

b. A description and location of the nuisance and the remedial action required to abate the nuisance;

c. The abatement deadline, to be determined by the enforcement officer, allowing a reasonable time for the performance of any act required;

d. A statement that the order may be appealed and a hearing before the Legislative Hearing Officer obtained by filing a written request with the city clerk before the appeal deadline which shall be the abatement deadline designated in the order or seven (7) calendar days after the date of the order, whichever comes first; and

e. A statement that, if the remedial action is not taken nor a request for a public hearing filed with the city clerk within the time specified, the city will abate the nuisance and charge all costs incurred therein against the real estate as a special assessment to be collected in the same manner as property taxes.

(2) *Setting hearing date.* In the event that an appeal is filed with the city clerk, the city clerk shall within two (2) weeks fix a date for a public hearing.

(3) *Notice of hearing date.* In the event that an appeal is filed, the city clerk shall mail a notice of the date, time, place and subject of the hearing to the owner and known responsible parties. The city clerk shall also mail the notice to a citizen participation district council for the district where the nuisance is located requesting that it notify the surrounding property owners and occupants. The city clerk shall also notify the enforcement officer.

(4a) *Legislative Hearing Officer.* The legislative hearing officer appointed by the city council president shall convene a public hearing at which time the appellant shall have an opportunity to present evidence and testimony to support the appeal of the abatement order. The legislative hearing officer may receive evidence and testimony from the enforcement officer and other parties who wish to be heard. Upon receiving the evidence and testimony, the legislative hearing

officer shall make a written recommendation to the city council which may confirm, modify, revoke, alter or cancel the order of the enforcement officer.

(4) *Hearing.* The city council shall review the recommendations of the legislative hearing officer and may confirm, modify or approve the order of the enforcement officer. If the council determination requires abatement, the city council shall, in the resolution, fix a time within which the nuisance must be abated and shall provide that, if the nuisance is not eliminated within the time specified, the city may abate the nuisance and assess the costs of the abatement to the subject real estate as a special assessment.

(5) *Abatement.* If the remedial action is not taken nor an appeal filed within the time specified, the city may abate the nuisance.

**Sec. 45.11. Substantial abatement procedure.**

When the enforcement officer determines that a nuisance exists on a property and the cost of abatement of the nuisance is estimated to exceed three thousand dollars ($3,000.00), or the abatement involves demolition of a building other than a structure accessory to a residential building, or the abatement substantially diminishes the value of the property, and except in the case of an emergency as provided for in section 45.12, the city shall abate the nuisance by the procedure described below. A good faith estimate of the abatement costs, not the actual cost calculated after the abatement is completed, shall be the basis which determines whether this abatement procedure shall be used.

(1) *Orders.* The enforcement officer shall serve a written order upon the owner, all interested parties and any responsible party known to the officer. The order shall contain the following:

a. A description of the real estate which is sufficient for identification and which shall include the legal description;

b. The location of the nuisance on the property;

c. A description of the nuisance and the basis upon which it is declared to be a nuisance;

d. The remedial action required to abate the nuisance;

e. The abatement deadline, to be determined by the enforcement officer, allowing a reasonable time for the completion of any act required;

f. A statement that if the remedial action is not taken before the abatement deadline, the matter will be referred to the city council, who, after a public hearing, may order the city to abate the nuisance and charge all costs incurred against the real estate as a special assessment to be collected in the same manner as taxes.

(2) *Notice to public.* When an order requires, exclusively or as an option, the demolition of a building, the public shall be put on notice as follows:

a. The owner or any responsible party is required to provide full disclosure of the order to abate to all interested parties, all present or subsequent renters, and any subsequent owners.

b. The owner or any responsible party is required to provide full disclosure of the order to abate in a complete Truth-in-Sale of Housing Report to any subsequent owners per Legislative Code, Chapter 189.

c. The enforcement officer shall post a placard in a conspicuous place which declares the property a "nuisance building" which shall include the following:

1. Name of the city;

2. The name of the authorized department having jurisdiction;

3. The chapter and section of the ordinance under which it is issued;

4. A statement declaring the property to be a nuisance condition and subject to demolition;

5. The date that the placard of nuisance condition is posted;

6. A statement of the penalty for defacing or removal of the placard.

d. The enforcement officer shall notify the council secretary by sending a copy of the order to abate to the council secretary.

e. The council secretary shall notify the city council and cause to be published on the council agenda the addresses receiving orders to abate.

(3) *Setting hearing date.* If the remedial action is not taken within the time specified in the written order, the enforcement officer will notify the city council that substantial abatement is necessary and appropriate. Upon being notified by the enforcement officer, the council secretary shall, within two (2) weeks, fix a date for an abatement hearing for the city council.

(4) *Notice.* Written notice of the time, date, place and subject of the hearing shall be given as set forth in this subdivision.

a. The council secretary shall immediately notify the enforcement officer.

b. At least ten (10) calendar days prior to the hearing, the enforcement officer shall notify the owner or his duly authorized representative by personal service of the notice of hearing and all interested parties or their duly authorized representative by certified mail. If, after reasonable effort, service cannot be made, either of the following methods of notice shall be considered adequate.

1. Confirmed mail service which is either certified mail with signed receipt returned or first class mail confirmed by written response.

2. Mailing the notice to the last-known address and publishing the notice once a week for two (2) weeks in a newspaper of general circulation in the city and posting the notice in a conspicuous place on the building or property.

c. At least ten (10) calendar days prior to the hearing, the enforcement officer shall notify the heritage preservation commission if the nuisance building is located in a heritage preservation district.

d. The council secretary shall notify the city council and cause the notice of public hearing to be published on the council agenda.

(4a) *Legislative hearing officer.* Prior to the hearing, the legislative hearing officer appointed by the council president shall provide the appellant with an opportunity to meet and informally discuss the matter. The legislative hearing officer may submit to the council a recommendation based on the information obtained at such a meeting.

(5) *Hearing.* At the time of the public hearing, the city council shall hear from the enforcement officer and any other parties who wish to be heard. After the hearing, the city council shall adopt a resolution describing what abatement action, if any, the council deems appropriate. If the resolution calls for abatement action, the council may either order the city to take the abatement action or fix a time within which the nuisance must be abated in accordance with the provisions of Chapter 33 of this Legislative Code and provide that if corrective action is not taken within the specified time, the city shall abate the nuisance.

(6) *Notice of city council action.* The council secretary shall give a copy of this resolution to the enforcement officer,

who shall serve copies to any of the parties required to be notified in subsection (4).

**Sec. 45.11.1. Collection of abatement costs.**

In the event the city abates the nuisance pursuant to the provisions of sections 45.10 and 45.11, all costs incurred by the city shall be calculated and reported to the council. The council shall schedule a hearing following notice thereof given in accordance with the requirements set forth in section 14.01 of the Charter. Upon the conclusion of the hearing, the council shall, by resolution, provide for the collection of those costs in the same manner as a special assessment payable in a single installment, or by up to ten (10) equal annual installments as the council may provide.

**Sec. 45.12. Emergency abatement procedure.**

When the enforcement officer determines that an attractive nuisance, a nuisance condition or a dangerous structure as defined in section 43.02 exists on a property which constitutes an immediate danger or hazard which if not immediately abated will endanger the health or safety of the public and there does not exist sufficient time to follow the procedures of sections 45.10 or 45.11, the city may abate the nuisance by the procedure described below:

(1) *Order.* The city shall order emergency abatement by an administrative order to be signed by the division of property code enforcement, the director of the department of police or the director of the department of fire and safety services or their officially designated representative.

(2) *Notice of abatement.* Following an emergency abatement, the council shall schedule a hearing following notice thereof given in accordance with the requirements set forth in section 14.01 of the Charter. The notice shall contain:

a. A description of the nuisance;

b. The action taken by the city;

c. The reasons for immediate action;

d. The costs incurred in abating the nuisance; and

e. The date, time and place of the public hearing.

(3) *Legislative hearing officer.* Prior to the hearing, the legislative hearing officer appointed by the council president shall provide the owner with an opportunity to meet and informally discuss the matter. The legislative hearing officer may submit to the council a recommendation based on the information obtained at such a meeting.

(4) *Hearing.* At the time of the hearing, the city council shall hear from the enforcement officer and any other parties who wish to be heard. After the hearing, the city council may adopt a resolution levying an assessment for all or a portion of the costs incurred by the city in abating the nuisance payable in a single installment, or by up to ten (10) equal annual installments as the council may provide.

**Sec. 45.13. Penalty.**

Any person who violates any provision of this chapter or fails to comply with a lawful written order issued pursuant to sections 45.10 or 45.11 or a lawful verbal order issued pursuant to section 45.06 shall be guilty of a misdemeanor. Each day during which any noncompliance or violation continues shall constitute separate misdemeanor offenses.

**Sec. 45.14. Other remedies.**

(a) The time limits specified in any order issued under section 45.11 is the applicable time period for completion of the rehabilitation and shall supersede all other time limits from Chapters 33 and 43.

(b) Nothing in this chapter shall be construed as relating to Chapter 113 pertaining to snow removal or Chapter 163 pertaining to abandoned vehicles.

Supreme Court, U.S.
FILED
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CLERK

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No. 01-791

# In the Supreme Court of the United States

CITY OF ST. PAUL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

The National Housing Act confers upon the Secretary of Housing and Urban Development the "power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any properties conveyed to him" following the default of a homeowner with a HUD-insured mortgage under the Single Family Mortgage Insurance Program. 12 U.S.C. 1710(g). The same Section of the Act also gives the Secretary the power to "sell real * * * property acquired by the Secretary pursuant to the provisions of this chapter on such terms and conditions as the Secretary may prescribe." In an effort to ensure that such property is sold as quickly as possible at affordable prices to purchasers who will be owner-occupants, the Secretary has issued regulations providing that the property will not be renovated by HUD prior to sale but rather "will be offered for sale in 'as-is' condition." 24 C.F.R. 291.100(c).

The question presented is:

Whether the court of appeals correctly held that principles of "conflict preemption" and intergovernmental immunity barred petitioner from applying its nuisance-abatement ordinance to force HUD—under threat of demolition—to make extensive repairs to a HUD-acquired house.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 258 F.3d 750. The opinion of the district court granting a permanent injunction (Pet. App. 8a-21a) is unreported. The opinion of the district court denying a stay or modification of the injunction (Pet. App. 22a-25a) is reported at 193 F.R.D. 640.

### JURISDICTION

The judgment of the court of appeals was entered on August 2, 2001. The petition for a writ of certiorari was filed on October 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Congress created the Single Family Mortgage Insurance Program as part of the National Housing Act, 12 U.S.C. 1701 *et seq.*, to further the national goal of "a decent home and a suitable living environment for every American family." 12 U.S.C. 1701t. As part of its mandate to assist in the provision of affordable housing, the Department of Housing and Urban Development (HUD) insures mortgages on single-family houses. See 12 U.S.C. 1709. By protecting mortgagees against default losses, HUD encourages mortgage companies to lend money to home buyers who otherwise might not qualify for conventional mortgage loans. That, in turn, serves Congress's goal of increasing the supply of affordable housing throughout the nation and, in the process, "preserv[ing] neighborhoods and communities." 56 Fed. Reg. 13,996 (1991).

Congress gave HUD broad authority to dispose of houses it acquires when insured mortgages are defaulted. 12 U.S.C. 1710(g) ("[T]he Secretary shall have power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, *in his discretion*, any properties conveyed to him in exchange for debentures and certificates of claim as provided in this section.") (emphasis added). Indeed, in 1998, Congress conferred an even broader authority on the Secretary by adding a sentence to that same provision of the National Housing Act: "The Secretary may sell real * * * property acquired by the Secretary pursuant to the provisions of this Act *on such terms and conditions as the Secretary may prescribe.*" Act of Oct. 21, 1998, Pub. L. No. 105-276, § 601(d), 112 Stat. 2674 (emphasis added); see Pet. App. 18a.

In the past, HUD's policy was to make immediate extensive repairs to houses it acquires through the insured mortgage program, with the goal of completely renovating the houses prior to marketing them. Pet. App. 12a. HUD, however, abandoned that practice in the 1970's, for several reasons. It found that the repairs were costly for the Single Family Mortgage Insurance Fund, which insured the properties, and were often undone by acts of vandalism while the houses were still vacant and being marketed. HUD determined, as well, that it was frequently defrauded by contractors hired to perform the repairs. It also found that monitoring the construction process was expensive and placed a burden on its limited staff. Finally, prospective buyers often preferred to pay a lower price for the property and renovate the houses to their own liking. *Id.* at 13a & n.2; see 56 Fed. Reg. at 13,997.

Based on the extensive difficulties created by its policy of repairing houses before disposing of them, HUD initially changed its internal guide, the Property Disposition Handbook, to reflect a preference for sales in an "as is" condition and later, in 1991, promulgated regulations. Those regulations provide that houses acquired by the Secretary under the Program would not be renovated but rather "will be offered for sale in 'as-is' condition." 24 C.F.R. 291.100(c)(1) and (2); see 24 C.F.R. 291.100(c)(3). Thus, rather than repairing houses, HUD seeks to sell them as quickly as possible at affordable prices to owner-occupants and does not permanently retain title to the properties as rental units. See 56 Fed. Reg. at 13,996. Because HUD owns tens of thousands of single-family houses throughout the country at any given time as a result of the Program, Pet. App. 5a, HUD does not market the

properties itself. Instead, it contracts with several private firms to market the properties it acquires.[1]

2. a. On April 22, 1999, the Secretary acquired title to a house located at 1328 Minnehaha Avenue West in St. Paul, Minnesota, which was financed with a HUD-insured mortgage. Pet. App. 8a. The mortgagor who had occupied the house defaulted on the HUD-insured mortgage and vacated the premises sometime before August 1998. C.A. App. 25, 26. Homeside Lending, the mortgagee, then foreclosed on the property. *Id.* at 26. Because the mortgage was insured by HUD, Homeside Lending submitted a claim to the Single Family Mortgage Insurance Fund for its losses and, as part of the claims process, conveyed title to the house to the Secretary. *Id.* at 91, 92.

After HUD acquired the house at 1328 Minnehaha, the HUD contractor in St. Paul, First Preston Management, Inc., conducted an inspection of the property. Pursuant to HUD's current policies, First Preston corrected two immediate hazards. It capped the natural gas lines in the house and disconnected the electricity. It also locked all of the windows and doors in the house in order to prevent vandalism, mowed the grass and, later in the year, shoveled the snow from the sidewalk and driveway. Pet. App. 2a. Upon acquiring the

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[1] Although HUD no longer renovates the houses before selling them, HUD does repair any immediate hazards. The HUD contractor is required to perform an initial inspection of all houses and, within 24 hours of discovery, correct any condition that presents a health or safety hazard to the public or to the property. C.A. App. 19, 22, 23, 92, 93. The HUD contractor also must routinely inspect the property and take all necessary action to maintain it in a presentable condition and to prevent any deterioration. *Id.* at 93. For example, trash must be removed, grass must be cut, and snow must be shoveled. *Id.* at 22.

house, HUD developed a marketing plan for the property. Following HUD policy, First Preston obtained an appraisal and began to advertise the house for sale "as is." *Ibid.*

b. In 1991, petitioner enacted an ordinance authorizing it to declare any vacant property in St. Paul to be a "nuisance building" if, after an inspection, it is found to contain "multiple housing code or building code violations." Pet. App. 80a. When a property has been identified as a "nuisance building," the ordinance authorizes a City inspector to order the owner of the property to undertake whatever action the City official deems necessary to abate the "nuisance." *Id.* at 90a-92a. If the abatement ordered by a City inspector is not completed within the time specified by the official, the St. Paul City Council is authorized, after a hearing, to order the owner to abate the "nuisance." *Id.* at 92a-93a. If the owner does not comply with the City Council's order to abate, the City Council can authorize the City to demolish the building and assess the cost of demolition against the property. *Id.* at 93a-94a; see generally *id.* at 9a-10a. Under the ordinance, the City does not need the permission of the property owner to demolish the building and assess the costs to the property owner, and there is no required judicial proceeding before the demolition. *Id.* at 93a-94a.

As early as August 1998, eight months before HUD acquired title to the property at 1328 Minnehaha, petitioner was aware that the house met the definition of a vacant building under its ordinance, because it was unoccupied and not in compliance with the code. C.A. App. 25. Petitioner, however, did not commence nuisance abatement proceedings against Homeside Lending, the registered owner of the property at that time. Petitioner also did not serve on Homeside Lending a

"New Owner Vacant Building Registration Form," a requirement under its ordinance. *Id.* at 25, 26. But when petitioner learned that the deed to the house had been conveyed to HUD on April 22, 1999, and recorded on June 2, 1999, petitioner promptly sent HUD the vacant building registration form. *Id.* at 26. On July 22, 1999, petitioner inspected the house for code violations. *Ibid.*

On August 6, 1999, petitioner sent the Secretary in Washington, D.C., an "Order to Abate Nuisance Property." Pet. App. 9a. Petitioner's Order stated that a City inspector had determined that the house was a "nuisance building" under petitioner's ordinance. *Ibid.* The Order provided that if the Secretary did not correct the building's conditions by September 7, 1999, petitioner would begin a process to "demolish and raze the home." *Ibid.* On August 9, 1999, three days after the Order was issued, a City inspector posted a notice on the house declaring it to be a "nuisance building." C.A. App. 27. The notice was posted while HUD was actively marketing the property. *Id.* at 93.

On August 26, 1999, an inspector having conducted a comprehensive code compliance inspection of the house, petitioner detailed in a letter to the Secretary the repairs the inspector determined to be necessary to correct the "nuisance" condition. Pet. App. 2a, 9a. The repairs required by the City inspector were not limited to correcting immediate health and safety problems. HUD was required, *inter alia*, to "replace all floor coverings, including carpet, completely rebuild the garage, install new storms and screens for all windows and doors, repaint the exterior and interior of the house, and rewire the basement with switches and outlets." *Id.* at 2a. The repairs that petitioner demanded the Secretary make to the house constituted an extensive

renovation of the property with an estimated cost to HUD of $30,000 to $40,000. *Ibid.*

After it conducted the code compliance inspection of the house, petitioner notified the Secretary that HUD was required to post a $2000 performance bond with petitioner and apply for building permits if it wanted to extend the deadline of September 7, 1999, for abating the "nuisance." Pet. App. 2a. HUD was told that if it posted the performance bond and obtained building permits, HUD would be allowed six months within which to make the repairs, and petitioner would halt its planned demolition of the house. C.A. App. 28.

On September 10, 1999, a City official reinspected the house and found that none of the repairs ordered by petitioner had been made by the Secretary and that HUD had not posted the performance bond. C.A. App. 28. The City inspection official then requested the City Council Secretary to schedule a hearing on whether petitioner should demolish the house. The Council Secretary scheduled a legislative hearing before a City official for October 19, 1999, and a public hearing before the City Council for October 27, 1999. Pet. App. 9a-10a.

On October 27, 1999, HUD obtained a buyer for the house, Keith P. Burg of St. Paul, who agreed to pay $25,009. Pet. App. 3a. Burg was aware of the pending code compliance orders regarding the property and informed HUD that he was able and willing to make all of the repairs required by petitioner before moving into the house. He planned to renovate the property in the fall of 1999 and occupy the house as his principal residence by winter. *Id.* at 3a, 10a.

That same day, the City Council conducted a public hearing to consider whether to demolish the house. Prior to the hearing, Burg talked to City officials, including the legislative hearing officer, about his offer to

purchase the house and his ability to begin making repairs to it. At the hearing, a representative of First Preston appeared and informed the City Council of Burg's offer to purchase the house and of his ability to make the repairs ordered by petitioner. Pet. App. 10a.

The City Council adopted a resolution ordering that by November 15, 1999, the Secretary must complete all of the repairs to the house ordered by the City inspector in his August 26, 1999, letter to the Secretary. Pet. App. 3a, 10a. The resolution authorized City officials to demolish the house, fill the site, and assess HUD for the cost of demolition if the repairs by HUD were not made by the November 15 deadline. *Id.* at 10a; C.A. App. 124-125.

Following the City Council vote, Burg contacted the St. Paul Mayor's Office in an attempt to prevent demolition of the house. In addition, HUD requested in writing that the City Council reconsider its order to demolish, but the Council refused to reopen the matter. Pet. App. 3a. On December 6, 1999, petitioner informed HUD it would proceed with the demolition. *Ibid.* On February 8, 2000, petitioner's demolition contractor obtained a permit from petitioner to raze the house. *Ibid.*

3. In light of the looming demolition, the United States brought this action against petitioner. On February 14, 2000, the district court granted the motion of the United States for a temporary restraining order to prevent demolition. The parties then filed cross-motions for summary judgment. Pet. App. 10a-11a.

The district court granted summary judgment in favor of the United States, finding that application of petitioner's ordinance would frustrate the goals and objectives of HUD in carrying out the Single Family Mortgage Insurance Program. It held that HUD is

immune from petitioner's enforcement of its ordinance and that such application of petitioner's ordinance is preempted by federal housing laws. Pet. App. 11a-20a. The district court issued a permanent injunction barring petitioner from "ordering the Secretary * * * to abate any nuisance conditions that the City has identified in any property owned by HUD," from "demolishing as a nuisance building any structure located on a property owned by the Secretary," and from making "any mandatory inspections that would hinder the use or transfer of HUD-owned properties." *Id.* at 21a.

Petitioner filed a notice of appeal and moved to stay the injunction pending appeal. The district court denied petitioner's motion for a stay, Pet. App. 22a-25a, and the Secretary then closed on the property with Burg. *Id.* at 3a.

4. The court of appeals affirmed, holding that application to HUD of petitioner's nuisance abatement code would impermissibly interfere with the operation of the National Housing Act. Pet. App. 1a-7a. The court traced the history of HUD's practices of selling houses after default. The court observed that, perhaps as a result of HUD's experience with repairing the house at issue in *Burroughs* v. *Hills*, 741 F.2d 1525 (7th Cir. 1984), cert. denied, 471 U.S. 1099 (1985), "and many other similar experiences," HUD had abandoned its practice of holding houses prior to sale for the substantial period of time necessary to make extensive repairs. Pet. App. 4a-5a.[2] Having "determined that its previous practice of substantially repairing homes was a failure," HUD switched to selling houses "on an 'as is'

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[2] In *Burroughs*, the value of a property fell from $40,000 to $1 during the 18 months that HUD owned it. Pet. App. 5a (citing *Burroughs*, 741 F.2d at 1527).

basis, without repairs or warranties." *Id.* at 5a-6a (quoting HUD, *Property Disposition Handbook*, Directive No. 4310.5 (May 1994)) (*Handbook Directive No. 4310.5*); see 24 C.F.R. 291.100.

The court of appeals rejected petitioner's argument that 42 U.S.C. 3535(i)(1), which provides that "any * * * acquisition [by HUD] of real property shall not deprive any State or political subdivision thereof of its civil or criminal jurisdiction in and over such property," authorizes petitioner to apply its nuisance ordinance to HUD. The court noted that Section 3535(i)(1) applies by its terms only when HUD purchases a property by "foreclosure or any other sale." Pet. App. 7a (quoting statute). The court explained that "HUD * * * did not purchase [the property at issue in this case] at a foreclosure or other sale." *Ibid.* Citing *United States* v. *Chester*, 144 F.2d 415 (3d Cir. 1944), the court explained that the purpose of Section 3535(i)(1) was to make clear that federal property acquired by foreclosure or other sale did not become a "'federal enclave' so as to deprive the host state of all civil and criminal jurisdiction." Pet. App. 7a. There had been no claim in this case that the property at issue was a federal enclave.

The court of appeals concluded that "HUD must be able to carry out its federal functions in a relatively uniform fashion" and that

> HUD cannot be subjected to a vast multitude of municipal ordinances throughout the United States which ordinances require the federal government to spend federal funds, post bonds, and obtain a local building permit, with HUD suffering the prospect of destruction of federal property for failure to comply with local ordinances.

Pet. App. 7a. Accordingly, the court held that application to HUD of petitioner's ordinance impermissibly "retards, impedes, burdens and interferes with the operations of a constitutional federal law, the National Housing Act." *Ibid.* The court therefore affirmed the injunction issued by the district court. *Ibid.*

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. To fulfill the national policy of "a 'decent home and a suitable living environment for every American family,'" 56 Fed. Reg. at 13,996 (quoting 12 U.S.C. 1701t), the Secretary's current regulations provide for selling HUD-acquired properties "in 'as-is' condition, without repairs or warranties." *Id.* at 13,997; see 24 C.F.R. 291.100(c). In the mid-1970's, HUD began to institute the policy of selling acquired houses "as is" and without repairs, because of its unsuccessful experience with its former policy of renovating those houses prior to sale. HUD later issued regulations formally adopting the successor policy. As the preamble to the 1991 rulemaking explains:

> First, while properties are on the market, they are vacant and subject to vandalism. In some cases, expensive repairs, paid for out of the insurance fund, were undone in a single act of vandalism. Secondly, HUD frequently found itself the victim of fraud by those who contracted to perform repairs. Repairs that supposedly had been done had to be repeated at extra expense and inconvenience to the buyers. The staff-intensive monitoring necessary to reduce the risk of fraud is prohibitive, considering the size of

> the staff in many HUD field offices. Finally, some purchasers of HUD-acquired properties plan to do extensive renovations. Repairs performed by HUD interfere with the renovation plans of purchasers, who prefer to pay a lower price for a property and make repairs at the same time they are renovating.

56 Fed. Reg. at 13,997. In contrast with its former policy, HUD now has a "policy of returning the properties to the market as quickly and cheaply as possible." *City of Country Club Hills* v. *HUD*, No. 99 C 7139, 2001 WL 1117276, at *6 (N.D. Ill. Sept. 17, 2001).

Application to HUD of the St. Paul ordinance is preempted, both because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000); see *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000), and because it "actually conflicts" with the federal regulation, *Geier*, 529 U.S. at 874. Congress broadly delegated to the Secretary the power, in his discretion, to "deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit" the HUD-acquired houses and to sell such houses "on such terms and conditions as the Secretary may prescribe." 12 U.S.C. 1710(g). The Secretary has "prescribed" the "conditions" for sale of property in 24 C.F.R. 291.100(c), which provides that houses acquired by HUD following default will be sold quickly in "as is" condition. Petitioner's ordinance would make it all but impossible for HUD to accomplish the primary purpose of the "as is" regulation—to bring houses to market quickly. In addition, petitioner's ordinance would require HUD to make the repairs the City deems necessary, rather than those that HUD deems necessary, and it would require

HUD to "find buyers within time frames set by the" City or be forced to post performance bonds. Pet. App. 17a. Petitioner's ordinance would thus stand as an obstacle to the federal policy and actually conflict with the HUD regulation. See *Geier*, 529 U.S. at 874-875 (state tort suit actually conflicted with policy of federal regulatory standard); *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."). Its application to HUD is therefore preempted.

Contrary to petitioner's assertions (Pet. 21, 22), "conflict preemption" may occur without an express statement of intent to preempt. *Geier*, 529 U.S. at 884 ("conflict pre-emption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent"); *Booker* v. *Edwards*, 99 F.3d 1165, 1168-1169 (D.C. Cir. 1996) (allowing HUD to sell property acquired after default, without having to comply with local law entitling tenant to right of first refusal).[3] Petitioner cites (Pet. 21) this Court's

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[3] Petitioner's assertion that there is no conflict between its ordinance and HUD's regulation, Pet. 16-17, is based on a misunderstanding of HUD's Handbook on Property Disposition, an internal agency guide. Petitioner cites a provision of the Handbook that permits repairs to be made when the "property needs repair to comply with actively enforced local codes or unrepaired sales are prohibited by such codes or local ordinance." Pet. 16 (quoting *Handbook Directive No. 4310.5*, § 10-11A(4)). But the Handbook clarifies that repairs may be done for that reason "only when the necessary staff and contractor resources are available [and] the repairs are of a limited nature and can be accomplished expeditiously." C.A. App. 61. Moreover, HUD's authority to repair a house, as the Handbook makes clear, is entirely discretionary: "Field Offices *may* undertake limited repairs prior to selling

statement in *Solid Waste Agency* v. *Army Corps of Engineers*, 531 U.S. 159, 172 (2001), that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." This case, however, is not one in which an agency has approached "the outer limits of Congress' power." The Property Clause of the Constitution provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the * * * Property belonging to the United States," U.S. Const. Art. IV., § 3, Cl. 2, and the federal power under that Clause is plenary. *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 200-201 (1987). This Court has "repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States* v. *City & County of San Francisco*, 310 U.S. 16, 29 (1940)). When federal law regulating the disposition of federal property conflicts with state law, the state law must give way. *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580-581 (1987).

Petitioner further contends (Pet. 17, 22) that preemption is undermined by HUD's statement in the notice of proposed rulemaking that its proposed rule had no federalism implications under Executive Order

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certain properties," and "[t]he repair and sell technique should be used on *an exception basis only* and should not be used where such sales would adversely affect the office's performance indicators. *Id.* at 60 (emphasis added). The Handbook thus gives HUD some discretion to make limited repairs; nothing allows it to make substantial repairs such as those required under petitioner's ordinance or its letter of August 29, 1999, requiring renovations to the property in this case.

No. 12612, 3 C.F.R. 252 (1987). The Executive Order addresses federalism concerns in the relationship between the States and the federal government. See Pet. App. 62-68. The municipal ordinances at issue in this case do not implicate that relationship. In any event, petitioner's contention is mistaken, because intent to preempt is not necessary for conflict preemption. *Geier*, 529 U.S. at 884. In addition, the Executive Order expressly states that it is intended only to "improve the internal management of the Executive branch," and not to create any rights enforceable against the United States, its agencies, or its officers. Pet. App. 68.

Similarly, principles of intergovernmental immunity prevent petitioner from applying its local regulatory requirements to federally owned property. "It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (citing *EPA* v. *State Water Res. Control Bd.*, 426 U.S. 200, 211 (1976); *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976); *Mayo* v. *United States*, 319 U.S. 441, 445 (1943)). That immunity exists not only for federal installations or enclaves, but more broadly for federal instrumentalities and property. See, *e.g.*, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 331 (1819) (federally incorporated bank); *Mayo* v. *United States*, *supra* (federally purchased fertilizer).

2. Petitioner contends (Pet. 14-15) that the decision of the court of appeals conflicts with the Seventh Circuit's 1984 decision in *Burroughs*. That contention is mistaken. *Burroughs* involved a damage action brought by neighbors of a HUD-acquired building

against HUD officials and the local HUD contractor who managed the building. The district court held that no such action could be brought.[4] The Seventh Circuit affirmed that decision, applying the analysis of implied private rights of action under *Cort* v. *Ash*, 422 U.S. 66 (1975), and concluding that there was no such action under the housing laws that allowed neighbors of a HUD-acquired house to sue for damages. Although the court of appeals did state in passing that, under the then-current scheme, "HUD must conform to construction codes, etc., of local law just as the previous but now foreclosed mortgagors had to do," the court added immediately thereafter that "[t]he existence of such a policy of law is not in dispute and is illustrated by quotes from HUD documents which need not be detailed." 741 F.2d at 1529.

The Seventh Circuit's decision in *Burroughs* does not conflict with the Eighth Circuit's decision in this case. First, the question before the court in *Burroughs* was not whether HUD was required to follow all local housing laws, but whether private individuals had a private right of action for damages. The Seventh Circuit's holding in *Burroughs* that there was no such private right of action has nothing to do with the issue in this case. Second, even the Seventh Circuit's dicta in *Burroughs* regarding HUD's compliance with requirements of local law were prefaced with the statement that that issue was "not in dispute." The court's dicta

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[4] Petitioner focuses most of its attention (Pet. 10-13) on the district court's decision in *Burroughs*. The district court's holding that no private right of action was available has no bearing on the issue decided by the Eighth Circuit in this case. In any event, further review would not be warranted to address any tension that might exist between some of the statements in the district court's decision in *Burroughs* and the court of appeals' decision here.

on the issue accordingly clearly do not amount to a definitive ruling on the issue. Finally, the Seventh Circuit's dicta in *Burroughs* were also expressly premised on then-current "HUD documents." HUD's position on the issue has changed substantially since *Burroughs*, as documented by the regulations that now provide for a preference for sale in "as is" condition. Compare 24 C.F.R. 291.100(c) (properties "will be offered for sale in 'as-is' condition') with 741 F.2d at 1536 (quoting then-current HUD handbook statement that "[t]he overall objective is to (a) place properties in first-class condition to create maximum sales appeal at the highest obtainable sales price"). The legislative context has changed as well, with the enactment of the new legislation in 1998 further clarifying that "[t]he Secretary may sell real * * * property * * * on such terms and conditions as the Secretary may prescribe." 12 U.S.C. 1710(g).

Petitioner also errs (Pet. 18) in contending that in practice the Eighth Circuit's rule means that "HUD properties will operate under different rules in neighboring cities that function as one economic unit." HUD's "as is" sale policy applies nationwide, including within the Seventh Circuit. Indeed, as the recent decision in *Country Club Hills* demonstrates, district courts within the Seventh Circuit apply the same rule as did the Eighth Circuit here. And, of course, nothing in the decision below would prevent petitioner from applying its ordinance to the property after it has been conveyed by HUD to private ownership.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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